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POWER OF LEGISLATURE OVER PRIVATE PROPERTY.

The right of a Legislature, without reference to the Law of Eminent Domain, to change the Legal Character of Estates, or the Title to Property, by general or special Enactments.

In some form or other the constitutions of all our States have declared the right of private property to be among the essential and unalienable rights of all men; and they have secured this right by various fundamental guards and guaranties. What the right of private property is, and how far a legislature may make laws regulating and controlling this right, and upon what principles the judiciary power shall proceed in supervising such legislative action, are questions which have often been passed upon, but for the determination of which there has been no uniform and definite rule in this country. The fact that in a country distinguished for the success with which it has cultivated the sciences of government and jurisprudence, there is no subject of equal importance that has been involved in greater confusion, is proof that the inherent difficulties of the subject are very great.

By the Constitution of the United States, and by all the State constitutions as well, government has been divided

into three essential powers, the legislative, the executive, and the judicial. Without particularly defining the nature and extent of these powers, the American constitutions have generally declared it to be essential to the existence of a free government, that these three great departments of government be kept as distinct from each other as possible. Early in the history of our present institutions it was definitely settled by the Supreme Court of the United States, that the judiciary is a coördinate branch of government, and has the power of determining whether a given act of the legislature is repugnant to the provisions of the constitution with which it is alleged to conflict, and that the decision is conclusive.* The judiciary, then, are the appointed guardians of the Federal and State constitutions, and it is their duty to apply and enforce the restrictions which these supreme laws of the land have placed upon legislative action. But it has sometimes been asserted that the power of the judiciary goes beyond the construction, interpretation, and enforcement of the constitutional restraints; that, independently of constitutional provisions, the judiciary have the power to annul a legislative enactment which they consider to be contrary to the fundamental principles of natural justice or morality.

In considering, then, what checks the judiciary power may put upon legislative enactments, changing the legal character of estates, or the title to property, we shall treat,

First. Of the power of the judiciary over such acts of the legislature, irrespective of any constitutional provisions.

Secondly. Of such power under the Constitution of the United States.

Thirdly. Of such power under the State constitutions.

I. In determining what the power of our legislatures is, independently of any constitutional restrictions, we may derive much assistance from the judicial decisions and political writings of such countries as have no written constitutions. England, from whom we have derived most of the principles of our own jurisprudence and politics, has no fundamental law of the nature of our constitutions. *Magna Charta*, though it be still "the key-stone of English liberty" and the provisions of later times for the protection of life,

* *Marbury v. Madison*, 1 Cranch, 137.

liberty, and property, are merely legislative enactments, which Parliament may repeal or modify at pleasure. "So long as the English constitution lasts," says Blackstone, "we may venture to affirm that the power of parliament is absolute and without control."* The supremacy of parliament, also, has recently been declared by Lord Denman and Mr. Justice Coleridge in the Court of Queen's Bench;† and Mr. Hallam says that the absolute power of the legislature, in strictness, is as arbitrary in England as in Persia.‡ It is true that several English writers upon ethics and politics have maintained that the legislature can exercise the supreme power of the state only for the attainment of the great ends for which society was established; and that when it defeats these ends its acts are void. A like doctrine was laid down by a few early authorities in the English courts.§ But it does not appear that any statute has ever been held void in England, merely because the court thought it to be against common right or reason; and Mr. Chancellor Kent says, that "when it is said that a statute contrary to natural equity or reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the court is to give them a reasonable construction."|| There is no question that the generally received doctrine in England is, that an act of parliament, of which the terms are explicit and the meaning plain, cannot be questioned, or its authority controlled, in any court of justice.¶

It may safely be asserted, that, except in our own country, the judiciary is everywhere subordinate to the legislature, and has no authority to declare a legislative act void when its meaning is plain. It cannot well be doubted that the people of this country entered into the national and State compacts, with reference to the doctrine generally recognized throughout the civilized world at that time, that the legislative power is unlimited and supreme. One great object in the adoption of a written constitution as the fundamental rule of government, was to impose limitations upon the legislative power. The provisions of *Magna*

* 1 Com. 162.

† *Stockdale v. Hansard*, 11 Ad. and El. 253.

‡ 3 Constitutional History, 193.

§ *Bonham's Case*, 8 Co. 118; *Day v. Savage*, Hob. 85; *City of London v. Wood*, 12 Mod. Rep. 687.

|| 1 Com. 448.

¶ *Dwarris on Sts.* p. 490; *Coke*, 4 Inst. 36; *Lord Camden*, 19; *St. Tr.* 1066; 1 *Black. Com.* 91, 140, 162; *Christian's note* to p. 91.

Charta, and the English statutes of later times for the protection of life, liberty, and property, are limitations upon the power of the crown, and not upon that of parliament. We have incorporated these same provisions into our constitutions, as limitations upon legislative power, and not as limitations upon executive authority. The English constitution has been the work of parliament; and parliament has reserved to itself unrestricted dominion over property, and denied it to the crown. Here the people have made the constitutions, and have reserved this same dominion to themselves, and denied it to the legislature. But these very restrictions and reservations are proof of the infinite and unlimited power which our people thought would reside in the legislature unless restrained by a fundamental law; they go to show that our legislatures were instituted with all the powers of government which were not expressly or impliedly delegated to other departments, or reserved to the people themselves; and that they are beyond control, except as limited by the instruments of their constitution. This view was early taken by the Supreme Court of the United States, in the case of *Calder v. Bull.** In the case of *Cooper v. Telfair*, before the same court, Mr. Justice Patterson said: "I consider it as a sound political proposition, that whenever the legislative power of government is undefined, it includes the judicial and executive attributes."† Our courts have sometimes said that the legislature has such part of the sovereign power which resides in the whole body of the people, as has been delegated to it according to the constitution.‡ But in some States there are no powers specifically delegated to the legislature; and in all of them it seems to be true rather that the legislature wields all the sovereign power of the people, when not specially limited. This view is taken by Chief Justice Gibson, of Pennsylvania, who declares it to be "a postulate of a State constitution, which distinguishes it from the federal, that all the power of the people is delegated by it, except such parts of it as are specifically reserved."§

It is true that some eminent judges, when the question was not before them, have expressed a belief that there are restrictions upon the legislative power growing out of the nature of the civil compact and the natural rights of

* 3 Dall. 386.

‡ *Powers v. Bergen*, 2 Seld. 358.

† 4 Dall. 19.

§ *Kirby v. Shaw*, 7 Harris, 258.

men. Expressions of this kind have been quite common in the courts of New York.* But the later cases in that State expressly hold that the judiciary can only look to constitutional provisions for the limits of the law-making power.†

There are a few cases, however, which have been decided upon the ground that a statute is never to be construed against the plain and obvious dictates of reason. It was upon this principle that the Supreme Court of South Carolina declared void an act of the legislature which took the freehold of one man and vested it in another.‡ Of late the courts seem to be well agreed, that the only guaranties which the people have that their rights shall be protected, are those furnished by the constitution; and that the only checks which the courts can put upon legislative authority, are those which the constitution has placed in their hands.§

We conclude, therefore, that there are no restraints upon legislative interference with vested rights of property, except those provided by the federal and State constitutions.||

II. The checks imposed upon the authority of a legislature to change the legal character of estates, or the title to property, by the Constitution of the United States.

As the people have not conferred upon Congress any power to interfere with rights of private property in the States, except in particular cases, or in the exercise of the right of eminent domain, we have only to inquire what restraints the Constitution of the United States imposes upon the action of the State legislatures in this respect. The only clause which thus limits the power of the States, is that which prohibits their passing laws impairing the obligation of contracts. The provision which relates to the passage of *ex post facto* laws, has constantly been held to apply only to criminal or penal statutes.¶

* *People v. Supervisors of Westchester*, 4 Barb. 64; *People v. Mayor of New York*, 10 ib. 223; *People v. Edwards*, 15 ib. 529; *People v. Pratt*, 17 John. 195; *Rogers v. Bradshaw*, 20 ib. 735; *Taylor v. Porter*, 4 Hill, 146.

† *People v. Mayor of Brooklyn*, 4 Comstock, 419; *Town of Guildford v. Supervisors, &c.* 3 Kernal, 143; *People v. Toynbee*, 2 Parker's Crim. Cases, 490.

‡ *Ham v. M'Claws*, 1 Bay, 93; *Bowman v. Middleton*, 1 Bay, 252.

§ *Commonwealth v. Williams*, 11 Penn. 61; *Sharpless v. Mayor, &c.* 21 ib. 147; *Commonwealth v. McCloskey*, 2 Rawle, 373; *Bridgeport v. Housatonic R. R. Co.* 15 Conn. 475; *State v. Ewing*, 17 Miss. (2 Bennett,) 515.

¶ See also upon this subject, *Bennett v. Boggs*, 1 Baldwin, 74; *Barto v. Himrod*, 4 Seld. 483; *Goshen v. Stonington*, 4 Conn. 225; Smith's Commentaries on Statute and Constitutional Law, 286; *Van Horne's Lessee v. Dorrance*, 2 Dall. 304; Sedgwick on Statutory and Constitutional Law, ch. V.; *Fletcher v. Peck*, 6 Cranch, 135.

|| *Calder v. Bull*, 3 Dall. 886; *Carpenter v. Commonwealth of Penn.*, 17 Howard, 456.

By the prohibition against impairing the obligation of contracts, the supreme constitution has preserved inviolate from the action of a State legislature all compacts between parties, whether executed or executory, so far as they create rights of property or contain obligations binding upon the parties in law or equity. It is immaterial whether the party be a State, or corporation, or individual; or whether the contract be made in express terms by the parties, or is engrafted upon the contract by the law of the land. There is a well-defined distinction between a right under a contract, and the remedy by which this right may be enforced. But it is well settled, that a law which so affects the remedy as to impair the right itself, or one which imposes terms inconsistent with the original contract, is within the prohibitory clause of the constitution. Statutes of limitations are not ordinarily within this prohibition; but if such a statute should not allow a reasonable time after the passage thereof, before its operation should commence, within which suits on existing causes of action might be begun, such act would be unconstitutional.* An act of the legislature of Maine, changing the nature of a disseisin, and subjecting the owner to the loss of his lands, by barring him of his right to recover possession of them, when by existing laws he was not barred, was held to be unconstitutional so far as it was retrospective.†

In Massachusetts the courts have several times held that statutes changing estates of joint-tenancy into a tenancy in common, although they extend to past grants and devises, are not within this clause of the constitution, as their operation is not to impair any vested right, but rather to render the tenure more beneficial. In such cases the consent of the owners may be presumed.‡ Upon the same principle it has been held in New York that a private act of the legislature authorizing a sale of the estate of infants for their maintenance and education is not within the prohibitory clause of the constitution.§ And upon this principle, too, it would seem to be competent for the legislature to authorize one board of trustees to transfer their trust to another board. But without their consent, the trus-

* *Call v. Haggard*, 8 Mass. 430; *Society v. Wheeler*, 2 Gall. 194.

† *KENNEBEC Purchase v. Laboree*, 2 Greenleaf R. 275.

‡ *Holbrook v. Finney*, 4 Mass. 565; *Miller v. Miller*, 16 Mass. 59; *Burghardt v. Turner*, 12 Pick. 534. So in Penn. *Bambaugh v. Bambaugh*, 11 Serg. and R. 191.

§ *Cochran v. Van Surley*, 20 Wend. 365.

tees of a private charitable fund and institution cannot be divested of their rights by removal from office by the legislature, although they may have violated their duty and squandered the funds.* Without the consent of the parties, an act altering the charter of a college in material respects, has been held, in a celebrated case, to be a law impairing the obligation of contracts.† But the charter of any corporate body may be altered in its most essential features by the legislature, if the alteration be agreed to either before or after the passage of the statute making the alterations.‡

These cases seem to hold that a legislature may change the legal character of estates, or the title to property, without impairing the obligation of contracts, provided the consent of the parties be obtained, or can legally be presumed upon.

It is obvious that this clause, which prohibits the States passing laws impairing the obligation of contracts, is applicable to only a very small class of cases in which the State legislatures may seek to change the legal character of estates, or the title to property, by its enactments. The federal constitution leaves the States a liberty to pass retrospective laws, however unjust; to pass acts taking away vested rights of property; to dispense with general laws in favor of an individual; to legislate for particular cases; to overstep the limits of the law-making power by the exercise of judicial functions; § to violate the express provisions of their own constitutions; to do anything, in short, in the way of changing the legal character of estates, or the title to property, provided they do not impair the obligation of any contract; and there is no appeal to the federal courts of the Union, which enforce the provisions of the Federal Constitution. Here is one important check upon the authority of the State legislatures to interfere with the rights of private property; but the principal guaranties of these rights must be sought in the constitutions of the States themselves.

III. The checks imposed upon the authority of a legislature to change the legal character of estates, and the title to property, by the State constitutions.

* *Brown v. Hummel*, 6 Barr, 86. See also *Trustees v. Bradbury*, 2 Fairfield, 118; *Norris v. Trs. 7 Gill. and John.* 7.

† *Dartmouth Coll. v. Woodward*, 4 Wheat. 518.

‡ *Ehrenzeller v. Union Canal Co.* 1 Rawle, 190.

§ *Satterlee v. Matthewson*, 2 Pet. 413.

Although the constitutions of the various States of the American Union are unlike in many particulars, there is a great uniformity among them as to their great and fundamental principles; and especially in the protection which they give to the rights of property. The great constitutional provision for the division of the powers of government into the executive, legislative, and judicial, and the provision, which in various terms guarantees to life, liberty and property, the protection of the law, are to be found in the constitution of every State of the Union; and these are the provisions which furnish the principal securities of our rights and liberties. These two provisions amount to much the same thing. By the division of the powers of government, the legislature is prohibited from doing judicial acts; and though it is sometimes difficult to distinguish between legislative and judicial acts, it is clear that an act founded upon a judicial determination of a question of right or property would be repugnant to the constitution. And the provision which declares that no man shall be deprived of his life, liberty, or property, unless by the law of the land or the judgment of his peers, secures the right of judicial procedure and determination according to the course of the common law, whenever these privileges are attacked. Some doubt has been entertained as to the meaning of the term "the law of the land." But the history of its origin in *Magna Charta* and its use in the English statutes, shows that it does not mean merely an act of the legislature, for that would abrogate all restraints upon legislative authority; but that it means the regular course of administration of law in courts of justice.*

In the bill of rights, or declaration of rights, which forms a part of the constitution of most of the States, there are enumerated certain great political truths which the people deemed essential to a just administration of a free government. But however useful these general expressions may be as rules for legislative guidance, they cannot generally be made available in courts of law. In determining whether a law unwarrantably interferes with rights of private property, the courts must seek their authority

* 1 Hale's Hist. Com. Law, 128; 2 Inst. 45, 50; Reeve's Hist. Eng. Law, vol. 1, ch. 5; 3 Story on the Constitution, § 1783; 1 Bl. Com. 55; 2 Kent Com. 13; *Taylor v. Porter*, 4 Hill, 145; *Jones v. Perry*, 10 Yerg. 59; *Mayo v. Wilson*, 1 N. H. 55; *Hoke v. Henderson*, 4 Dev. 1; *Green v. Biddle*, 8 Wheat. 175; *Bronson v. Kinzee*, 1 How. 11; *Greene v. Briggs*, 1 Curtis C. C. 311; *Saco v. Wentworth*, 37 Maine, 165; *Peo. v. Toynbee*, 2 Parker's Crim. Cases, 490.

rather in the division of the powers of government, and the specific limitations imposed on the law-making power. Private rights of property are daily interfered with by legislative bodies without their authority being called in question. Such interference is often necessary for the common welfare of the community. How far the legislature may disturb private rights of property without passing the just limits of legislation, may best be seen by an examination of the cases that have arisen upon this question.

There are in every State of the Union, probably, general laws authorizing guardians and administrators, on proper application, to sell the property of infants and decedents. It is fully conceded that the legislature is competent to authorize such sales of property without the express consent of the owner, in case of his incapacity, by general laws.* But whether it may authorize the changing or divesting of titles by private acts, is a question upon which the courts are not agreed. In Massachusetts it is held that the legislature has power to authorize the sale of the real estate of minors, notwithstanding the same power had been delegated to the courts by a general law. In *Rice v. Parkman*, Chief Justice Parker said: "Indeed, it seems absolutely necessary for the interest of those who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere to convert lands into money. This power must rest in the legislature in this Commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves."† He goes on to show that it does not follow that, because the power has been delegated by the legislature to the courts of law, it is judicial in its character. "It is not a case of controversy between parties, nor is there any decree or judgment affecting the title to property."

This opinion was confirmed in a subsequent case, where a resolve authorizing the guardian of a lunatic to sell a portion of his real estate, was held valid;‡ and there has been an uninterrupted course of legislation of a similar character in this Commonwealth ever since the adoption of the State constitution.

* Sedgwick on Statutory and Constitutional Law, p. 170.

† 16 Mass. 326.

‡ *Davison v. Johonnot*, 7 Met. 388.

In New York it has been held that a private act of the legislature, authorizing the sale of the estates of infants for their maintenance and education, is within the scope of legislative authority. Mr. Chancellor Walworth in deciding this case remarked that "this power cannot constitutionally be so far extended as to transfer the beneficial use of the property to another person, except in those cases where it can be legally presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself, as in the case of a provision out of the estate of an infant or lunatic, for the support of an indigent parent or other near relation."*

An act of the legislature of Rhode Island confirming a sale made by a foreign executrix, for the payment of the debts of the testator, was held in the Supreme Court of the United States to be a proper exercise of legislation.† In the analogous case of *Watkins v. Holman*,‡ the same court remarked that it did not follow, because there was a general law upon the same subject, that the legislature could not pass a special act from a knowledge of its propriety in a particular case. The mode they should adopt was a question of policy, and not of power, and rested in the discretion of the legislature. In *Blagge v. Miles*,§ a resolve of the legislature of Massachusetts authorizing a trustee to transmute real property into personal, was held to be a constitutional exercise of the power of the legislature. "Assuming," said Story, J., "that such a resolve might be construed, under some circumstances, to be an exercise of judicial power, it would be difficult to apply the doctrine to a case like the present, where it is passed, not *in invitum*, but at the solicitation of the very person who, under the power, possessed a complete dominion over the disposal of the entire property."

In Kentucky a special act of the legislature directing the sale of the real estate of infants for the payment of the debts of an ancestor, was held valid;|| as also one appointing commissioners over the estate of an intestate to sell lands and pay debts.¶ Similar legislation has been sanc-

* *Cochran v. Van Suryay*, 20 Wend. 365.

† *Wilkinson v. Leland*, 2 Peters, 627, 660.

‡ 16 Peters, 25, 61.

§ 1 Story R. 426.

|| *Kirby v. Chittwood*, 4 Mon. 94.

¶ *Sherman v. Bassett*, 6 Mon. 592.

tioned in the courts of Alabama,* Illinois,† Ohio,‡ and Pennsylvania.§

Notwithstanding this array of authority, there are cases which hold that a special act or resolve of the legislature authorizing a sale of property in case of the infancy or other incompetency of those in whose behalf its acts are sought, is not within the legislative power. The Supreme Court of New Hampshire thought that such an act would infringe upon the province of the judiciary.|| The case of *Jones v. Perry* has sometimes been relied upon as a decision holding the same way.¶ But the weight of authority is clearly in favor of allowing the legislature to change the legal character of property by special acts, where general laws of the same kind are proper.

We are compelled to differ from a recent writer on constitutional law, who says that he "can entertain no doubt that the decisions which deny the propriety of legislative interference in these special cases are founded on the true principle."** We can see no constitutional objection to such an exercise of power, and we have shown that there is no other limit to legislative dominion over property than that imposed by the national and state constitutions.

But our legislatures have often overstepped the bounds of the law-making power in attempting to change the legal character of estates, or the title to property, by special enactments, from undertaking to determine some question of fact or law affecting rights of property, and making this the basis of their action. Such determination of a fact or right is judicial in its character, and legislative action upon such a basis is unconstitutional.†† Of this class was an act of the legislature of Illinois, which authorized so much of the lands of a deceased person to be sold as would be sufficient to raise a specific sum for the extinguishment of particular claims. The court held that there was a judicial determination of the fact that the estate was liable for certain debts, and therefore the act was unconstitutional.‡‡ And when, too, the legislature directed the as-

* *Holman v. Bank of Norfolk*, 12 Ala. 369.

† *Mason v. Wait*, 4 Scam. 127; *Dubois v. McLean*, 4 McLean, 486; *Doe v. Douglass*, 8 Blackford, 10.

‡ *Carroll v. Lessee*, 16 Ohio, 25.

§ *Estep v. Hutchinson*, 14 Serg. and R. 435; *Norris v. Clymer*, 2 Barr, 277; *Sergeant v. Kuhn*, 2 Barr, 393.

|| Opinion of Court, 4 N. H. 572.

¶ 10 Yerg. 59.

** Sedgwick on Statutory and Constitutional Law, 172.

†† *Ponder v. Graham*, 4 Florida, 23.

‡‡ *Lane v. Dorman*, 3 Scam. 240.

signment of dower to a widow by certain commissioners, the act was held void on the ground that the legislature had no power to determine that she was entitled to dower.* On the same principle an act of the legislature of Maryland requiring a husband to pay a trustee for the use of his wife, from whom such act divorced him, a sum certain annually, was held to be an exercise of judicial authority, and therefore unconstitutional.†

An act of the legislature of Pennsylvania appointing a trustee to make sale of real estate within the time during which the sale was forbidden by the testator, and against the consent of some of the parties in interest, was held to be a judicial act, and therefore unconstitutional.‡

There is another class of cases where the legislature has often exceeded its authority by seeking to influence the determination of private contested rights. Acts of this kind have almost invariably been held unconstitutional.§ Where taxes have been illegally assessed, a statute passed subsequently, providing that such taxes might, nevertheless, be levied and collected, cannot be extended by construction to affect a suit previously brought to recover for taxes levied and collected on such defective assessment.|| An act of the legislature declaring the intention and true construction of a former act on the subject of taxation, cannot control the construction of such prior act in controversies pending in the courts at the time of the passage of the declaratory statute.¶

Up to the beginning of the present century it had been the practice of our State legislatures to enact all sorts of laws for particular cases, setting aside verdicts and judgments, and suspending the operation of general laws in favor of individuals. Such informal legislation was once very common in Massachusetts;** but the courts in this State, and in others as well, long since put an end to such invasions of the judicial power.†† The case of *Calder v. Bull*, holding an act of the legislature of Connecticut, granting a new trial after the time for appealing had

* *Edwards v. Pope*, 3 Seam. 465.

† *Crane v. Meginnis*, 1 Gill. and John. 463.

‡ *Ervine's Appeal*, 16 Pa. St. 256.

§ *Lewis v. Webb*, 3 Greenleaf, 326; *Durham v. Lewiston*, 4 ib. 140.

|| *Thames Manufacturing Co. v. Lathrop*, 7 Conn. 550.

¶ *People v. Board of Supervisors of New York*, 16 N. Y. (2 Smith,) 424.

** 13 Am. Jurist, 72; see also 14 ib. 83.

†† *Holden v. James*, 11 Mass. 336; *Piequet Appt.*, 5 Pick. 65; *Lyman v. Mower*, 2 Vt. 517; *Stamford v. Barry*, 1 Aik. 314; *Merrill v. Sherburne*, 1 N. H. 199; *Young v. St. Bank*, 4 Ird. 391; *Officer v. Young*, 5 Verg. 320.

elapsed, constitutional, was decided upon the express ground that the act was passed under the old colonial charter, when the legislature was in the uninterrupted habit of exercising a general superintending power over the courts of law.*

The Supreme Court of Pennsylvania once held that an act of the assembly directing a judgment to be opened, was an exercise of jurisdiction of a remedial character, partly legislative and partly judicial, and not in violation of the constitution.† But this was going quite too far, and the case was subsequently overruled.‡ In regard to such mixed jurisdiction it may be remarked that whatever powers are usually exercised by courts of justice, belong exclusively to the department of the judiciary; and whatever properly belongs to the judiciary to do, the legislature is wholly precluded from doing.

The restriction intended to be imposed upon legislative authority by the division of the powers of government into the executive, the legislative, and the judicial, was, that the legislature should *only make laws*. As distinguished from the judiciary, the legislature cannot perform any of the functions which by common law and usage belong to the courts of justice. It is difficult to realize the extent of the protection afforded to private rights by this division of powers. It puts it out of the authority of the legislature to take the property of one man and give it to another;§ for this would be of the nature of a judicial decree; it prevents the legislature from determining the private contested rights of parties,|| for the determination of controversies between contending parties, the settlement of their rights, and the redress of their wrongs, are a peculiar feature of the judicial power; it puts it beyond the scope of the legislature to dispense with general laws in favor of a particular individual, for this is a determination of a fact, or right, which is within the cognizance of the judiciary. It is beyond the limits of the legislative power to pass retroactive laws taking away absolute vested rights. In a few of the States there is an express constitutional provision that the legislature shall not pass re-

* 3 Dall. 386.

† *Bradder v. Brownfield*, 2 Watts and S. 271.

‡ *Greenough v. Greenough*, 11 Pa. St. 489; *De Chastelluz v. Fairchild*, 15 Pa. St. 18.

§ *Jackson v. Lyon*, 9 Cowan, 664; *Society v. New Haven*, 8 Wheat. 464; *Laury v. Francis*, 2 Yerg. 534; *Dunn v. City Council of Charleston*, Harper, 200; *Hoke v. Henderson*, 4 Dev. 1; *Jackson v. Frost*, 5 Cowan, 346.

prospective laws. But in those States where there is no such prohibition, any material interference with vested rights of property would be held not to come within the proper limits of the law-making power.* If there had at all times been a clear perception of the nature and extent of the protection given to private rights by the division of the powers of government by our constitutions, the courts doubtless would have seldom claimed any right to arrest legislative action on the ground that it was repugnant to natural right.

Our examination shows that there are several classes of cases in which it is proper for the legislature to change the legal character of estates, or the title to property, by either general or special enactments. In these cases the legislature exercises a remedial power, enabling parties to do with their own property what they had not before the power to do. This should be done by general laws as far as practicable. But there is no constitutional objection to the exercise of the legitimate powers of the legislature in special acts in cases where a necessity is shown. It is not necessary that those in whose behalf the legislature has authorized a change of property should themselves have the beneficial use of it. Their estates may be sold for the payment of debts, or for the maintenance of near relatives. These remedial acts are passed not only to effectuate the rights of minors, lunatics, and others of like incapacity, but to enlarge the powers of persons in the enjoyment of property, for the management of which estates have been created by will or deed, but by reason of unforeseen contingencies have become insufficient to manage the property to which they relate. In no case can the legislature extend this remedial power so far as to adjudge that parties shall do with their property what is contrary to their presumed wishes and interest, or in violation of their rights; this power is to be exercised rather to effectuate the common rights and interests of all.

L. A. J.

* *Houston v. Bogle*, 10 Irdell, 496; *Wright v. Marsh*, 2 Greene (Iowa) 94; *Norman v. Heist*, 5 Watt. and Serg. 171.

*Circuit Court of the United States. Massachusetts District.
May Term, 1856.*

JESSE COFFIN v. JOHN H. SHAW, RESP. AND APPEL.

Where a minor, with the assent and allowance of his father, signed shipping articles for a whaling voyage, in the course of which, after arriving at full age, he deserted, it was held that, at the common law in Massachusetts, such desertion did not work a forfeiture of the father's right to his wages during minority.

The effect of the father's assent is to make it a contract with himself to the extent of his legal interest, namely, the term of minority, after which neither father nor son is bound.

The measure of damages in such case is the value of the son's proportion of the oil taken during his minority.

CURTIS, J. This libel was filed to recover the share or lay of the minor son of the libellant, earned in a whaling voyage on board the ship Alabama. The minor, with the assent and allowance of the father, signed a shipping paper at Nantucket, in the month of May, in the year 1846, for a whaling voyage to the Pacific Ocean and elsewhere. The boy arrived at full age on the seventeenth day of August, 1850, and on the twenty-first day of the following November deserted, while the vessel was lying at the Sandwich Islands.

It is insisted that this desertion worked a forfeiture of the lay earned by the minor during his minority, and so the father cannot recover. The argument is, that the son contracted, by signing the shipping paper, to serve during the entire voyage : that, as he made this contract with his father's consent, he represented and bound his father ; and, consequently, the express contract to perform the entire voyage being broken, the father's rights are forfeited.

But this argument assumes several positions which I think untenable. A father is entitled to the earnings of his minor children, and if one of them enters into an express written contract for work and labor, at a certain rate, to be performed during his minority, in his own name, the father may recover a compensation for such work. If the father did not assent to the contract, or allow his son to make it, he can recover on a *quantum meruit*, which the law implies ; if he did assent, the contract affords the measure and conditions of the compensation. And if the

nature of the contract which the father assents to is such that there is to be no compensation if the entire work shall not be performed, then the father can recover nothing for part performance; because the employer has not agreed to pay any one any amount for part performance; and the law will not imply a promise to pay for that, for which, by an express contract, it appears there was to be no payment. So that the true inquiry in this case is, whether there was an express contract made by the son, and assented to by the father as binding his rights, by force of which no compensation was to be made if the son should desert the vessel after he became of age.

To determine this question, it will be useful to consider what would have been the legal effect of this contract by the son, if he had been emancipated; or, as it is familiarly expressed in New England, if he had had his time given him by his father. In *Vent v. Osgood*, 19 Pick., 572, it was held that if a minor, after the death of his father, ship himself in a whale ship, the contract is voidable; and is avoided by his leaving the vessel before the completion of the voyage; and he may thereupon recover in a *quantum meruit* for his services.

In my opinion, this case contains a correct exposition of the common law of Massachusetts, where the contract now in question was made. It follows that, if the minor in this case had contracted without the assent of his father, his desertion of the vessel, on the first opportunity which occurred after he became of age, would not have worked a forfeiture; his express contract would have been avoided, and he would have been remitted to his rights, independent of that contract. What then is the effect of his father's assent? Simply, that so far as it is a contract for service during minority, it becomes a contract with the father, which he may enforce, and by which he is obliged, and which is not voidable by the minor, not being for his account. But neither the father nor the son is bound by the contract any further than this. The assent of the father is only to a contract for service by his son during minority; further than that he has no legal interest, and no legal right. And the son is not bound to serve after he comes of age. His own agreement, independent of his father's assent, does not bind him; for, being under age, his contract is voidable, and his father's assent to it can have no operation

after he becomes of age, and the parental control and right to his services no longer exist.

It is true the father may contract that his son shall begin a voyage during his minority, and serve while he continues under age, and not desert before the completion of the voyage, though it should not be terminated until after the son's majority. Under such a contract, what would be the legal effect of a desertion by the son, after his majority, upon the rights of the father to the stipulated compensation for his services while under age, may admit of doubt. So far as respects the service after majority, such a contract would be in the nature of a suretyship, and the compensation for its breach might not be a forfeiture, but damages.

But however this may be, the libellant has made no such contract. His assent to the contract made by his son cannot be carried further than his right and interest in that contract. Its legal effect was, that to the extent of the father's interest in the subject matter, that is, the services of the son during minority, the son contracted on the father's account, and as his representative. But beyond this the son did not represent the father; he acted for himself. My opinion therefore is, that there was no breach of any contract by the father; that so far as he was concerned the agreed service was fully performed, and consequently there was no forfeiture.

It should be observed that this is not a case of statute desertion, the effect of which, by force of the act of Congress, may be different from the effect attached to the same act by the principles of the maritime law. But upon that I give no opinion.

Another question has been made, whether the libellant should recover the value of his son's proportion of the oil taken during his minority, or only such a proportion of an entire lay as the time before he arrived at full age bore to the whole time spent in the voyage. The District Court adopted the former rule. It is most consistent with the nature of the contracts of seamen in whaling voyages, and I think it the proper rule.

The decree of the District Court is affirmed, with six per cent. damages and costs.

Stone, for the appellant.

Cushman, contra.

DAVID CROWELL, PLFF. IN ERROR, v. THE UNITED STATES.

No fishing vessel is entitled to bounty unless the contract actually made between skipper and fishermen be such as by statute is made a condition precedent thereto.

Where in addition to the usual written agreement to go on shares, the skipper made a private verbal bargain with the crew, to purchase their shares at a fixed price; it was held that this destroyed the right to bounty by leaving an important part of the contract in parol.

It seems that such a contract in writing would not be a compliance with the requirements of the law.

A payment of bounty by a collector without the production of such a shipping paper as is required by law, although such paper exists, is a payment without authority, and may be recovered back.

CURTIS, J.—This is a writ of error to the District Court in an action of assumpsit, for money had and received, brought by the United States to recover from the defendant money alleged to have been wrongfully received by him from the collector of the customs for the port of Salem, as and for fishing bounty. A bill of exceptions was taken by the defendant to certain rulings of the court at the trial, and a verdict having been found for the plaintiffs, the defendant has brought the record here by a writ of error.

The first error assigned is, that the judge refused to instruct the jury, on the prayer of the defendant to that effect, that the written agreement signed by the fishermen, to go on shares, was not avoided by a private verbal bargain with the master for the sale and purchase by him of the shares at a fixed rate per thousand fish, as neither the vessel nor the owners were bound by such a bargain, and it did not impair the right of the vessel to bounty.

The eighth section of the act of Congress of July 29, 1813, (3 Sts. at Large, 52,) is as follows: "That no ship or vessel of twenty tons or upwards, employed as aforesaid, shall be entitled to the allowance granted by this act, unless the skipper or master thereof shall, before he proceeds on any fishing voyage, make an agreement in writing or in print, with every fisherman employed therein, according to the provisions of the act entitled 'An act for the government of persons in certain fisheries.'"

The first section of that act, (3 Sts. at Large, 2,) requires the written or printed agreement to express, "that the fish, or the proceeds of such fishing voyage or voyages,

which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught; which agreement shall be endorsed or countersigned by the owner of such fishing vessel or his agent."

The instruction prayed for assumes that the real and true agreement made by the master with the fishermen was not wholly in writing or print; that in one material particular the actual agreement rested in parol—that particular being that the fishermen were not to have their shares of the fish specifically delivered to them as their own property, nor were they to have their part of the actual proceeds of the voyage divided among them—but in lieu of the latter, they were to have an agreed sum for each fish to which they would have been entitled if their shares of the fish had been specifically delivered to them. In other words, the fishermen's part of the proceeds of the voyage was not to be paid as the written or printed contract provided; but, in lieu thereof, they were to receive an agreed sum for each of their fish.

It has been argued that there is nothing in such an agreement inconsistent with the policy of the law, and that it is beneficial to the men, and is a lawful substitute for the fish, or the proceeds of the voyage. If this were conceded, it would not advance the argument. For it would still remain true that the agreement actually made was not in writing or print, signed by the master, and countersigned by the owner or agent of the vessel, and therefore, upon the express words of the law, there can be no title to bounty, and whatever may be said of the want of authority of the master, as between him and the owners, to make such a contract, cannot affect this case. For the sole question here is, whether the master did make such a contract, in writing or print, with the fishermen, as the law makes a condition precedent to the right to bounty. If he did not, it is immaterial whether he acted with or without authority from the owners. The title to bounty depends on his performance of this requirement; and whether he did right or wrong towards his owners in failing to perform it, is of no importance.

Nor can I assent to the position that if this actual contract had all been expressed in writing, or in print, it would have been a compliance with the requirements of the law.

In the most favorable view which can be taken of it, it substitutes a mode of ascertaining the value of the fishermen's lays, materially different from that pointed out by the act of Congress; and different from that in which the value of the owners' shares are ascertained; and that is by actual sales in the market. I cannot admit that fishermen would be in as favorable a position, when bargaining with the skipper for the value of their fish before the commencement of the voyage, as they would be if they had the benefit of the skill and knowledge of business of the owners or the agent in selling the fish in the market, and if such contracts were allowed, the fishermen would, universally, I fear, be deprived of this advantage. But I do not pause to examine this more fully, because it is enough to say that such a contract is not within the provisions of the act of Congress, and consequently, bounty cannot be claimed when it is made.

The next exception raises the question whether the mere nonproduction of a shipping paper to the collector, before he paid the bounty, assuming that a lawful paper existed, would enable the United States to recover back the money paid. It is argued that the title to the bounty depends on the existence of certain facts, and not upon the kind or amount of proof of those facts produced before the collector.

But it must be remembered that when an officer of the United States pays the public money to an individual, he confers no title to that money, unless he paid it in the lawful exercise of his official power. If he exceeded that power, the money may be recovered back. And he does exceed it if the law has absolutely required a particular document to be produced before him as evidence of title, and he dispenses with the production of that document. A payment made by the collector without the production of such a shipping paper as is required by law, is a payment without authority, confers no title to the money of the United States, and it may be recovered back. The defendant's counsel prayed the court to instruct the jury that this ground of recovery was not open to the plaintiffs, because not specified in the bill of particulars. I am inclined to think it is sufficiently specified there; for payment by mistake is one of the grounds of claim there mentioned; but however this may be, after the evidence in support of this ground had all been introduced, without objection, it was

too late to ask the judge to rule that this ground of recovery was not in the particulars of the demand.

Besides, it was purely a matter of discretion in the court below, how far the court would require the plaintiff to give notice of the grounds on which he intended to rest his claim; and a ruling in reference thereto is not the subject of a bill of exceptions.

Judgment affirmed, with six per cent. damages and costs.

T. K. Lothrop, for plaintiff.

Hallett, District Attorney, contra.

SELDEN F. WHITE *v.* THE VERMONT AND MASSACHUSETTS
RAILROAD COMPANY.

Under the eleventh section of the judiciary act, the Circuit Court has no jurisdiction of an action brought by an assignee on a bond which is filled up and declared upon as payable to order.

By a statute of Massachusetts (St. 1852, c. 76,) bonds or obligations under seal, issued by a corporation, are made equally negotiable with promissory notes: — *Held*, That in order to give jurisdiction to the Circuit Court of an action on such bond by an assignee, it must appear that the title being made capable of passing by delivery, did so pass from the first taker after the act went into operation.

CURTIS, J. This is an action of debt founded on obligations of the defendants under their corporate seal, brought by the plaintiff, a citizen of the State of New Hampshire, against a corporation, created by and having its place of business in the State of Massachusetts.

It appears by the agreed statement of facts, that these instruments were originally issued to and held by citizens of Massachusetts. Under the eleventh section of the judiciary act, this court has not jurisdiction unless they were payable to bearer. They are declared upon and are now filled up as payable to order, and not to bearer. If it be admitted that the plaintiff have the option to treat them as payable either to order or bearer, upon which I give no opinion, he has elected the former. After this I cannot pronounce them payable to bearer.

There is another view of the facts, which is also decisive on the question of jurisdiction.

It is agreed that these instruments were issued with the place for the name of the payee in blank, and that in point of fact they passed from hand to hand by sale and delivery. At the common law they were not negotiable, being writings obligatory under the seal of the corporation. A statute of Massachusetts, passed March 30, 1852, (St. 1852, c. 76,) provides that bonds and other obligations under seal, purporting to be payable to bearer, or some person designated as bearer, or payable to order, which have been, or hereafter shall be issued by any corporation or joint stock company, are made negotiable, in the same manner and to the same extent as promissory notes were then negotiable.

These bonds bear date some years before this statute was passed. It does not appear that the first taker sold and delivered them after the statute went into operation; and consequently, it does not appear their legal title was capable of passing by delivery, and did so pass from the first taker. If not, this is a suit to recover the contents of a chose in action in favor of an assignee, and within the prohibition of the eleventh section of the judiciary act. Where promises are made to bearer, and such promises, in point of law enure directly to the bearer, and he is capable of sustaining an action in his own name as the promisee, it has been held he is not an assignee, within the meaning of the eleventh section of the judiciary act. But if these bonds were issued to and transferred by the first taker before the date of the act, and were valid promises to him, they were not then legally negotiable by delivery; and if made so after they were originally issued and negotiated by the first taker, the holder would, in my opinion, be an assignee, within the meaning of that section. He would be the owner of a promise, originally made to another, and which that other alone could enforce at law, until, by a subsequent provision of law, authority was given to such holder to negotiate the obligation, and to sue on it in his own name.

For these reasons I am of opinion the suit must be dismissed for want of jurisdiction.

*H. G. and H. M. Parker, for the plaintiff.
Hutchins, contra.*

MERRILL A. FORBUSH AND AL v. BRADFORD AND AL.

THE SAME v. NELSON WALLING.

THE SAME v. ISRAEL M. SOUTHWICK AND AL.

THE SAME v. C. A. WHEELOCK AND AL.

Principles on which the court allows or refuses an interlocutory injunction in patent causes.

These were motions for temporary injunctions, to restrain the defendants from using the patented improvement which was the subject of an action at law between the same parties in which the plaintiffs had a verdict. The particular facts deemed important by the court, appear in the opinion.

CURTIS, J. In acting on applications for temporary injunctions to restrain the infringement of letters patent, there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for making or refusing the order. And the state of the litigation, where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties, by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused; and if at all, whether absolutely or upon some and what conditions. In this case the thing patented is an improvement on a loom. The loom itself is not claimed; but only a particular modification of a loom previously in use.

The defendants in these cases do not make and sell looms having the patented improvement; they only use in their mills certain numbers of such looms. The complainants are makers of looms, but do not use them. So that this particular mode of infringement by the use of the thing patented, though it is a violation of the exclusive right claimed by the complainants, does not deprive them of a monopoly which they desire to retain in their own hands, because practically, it deprives them only of what they would be entitled to receive for a license to use the thing patented. Nor does it, like the manufacture and sale of the thing patented, constantly widen the field of litigation, and render it more and more difficult for the complainants to vindicate their rights.

On the other hand, the defendants cannot be prohibited from using the thing patented without being at the same time deprived of the use of the entire loom. For though it is possible to alter their looms and work them without the patented improvement, it is shown that in the present state of the business, and while this litigation is pending, no prudent man would do this. The practical effect of an injunction would therefore be to stop all these looms, and thus deprive the defendants of the use of a large amount of capital lawfully invested, and which they have the right to the benefit of; and it would also throw out of employment a large number of operatives who are now engaged in running the looms, and in the processes of manufacture which depend upon their use. All this would not prevent the court from granting an injunction, if the right had been finally established at law. But a bill of exceptions has been taken, upon points which involve the validity of the patent. This, again, does not present an insuperable objection to a temporary injunction. This court is bound to exercise its own judgment upon the questions involved in the bill of exceptions, with a view to see whether the litigation that remains, presents such serious doubts concerning the title as ought to influence its judgment in granting or withholding the injunction. I can conceive of many cases in which a temporary injunction ought to issue, where there has been a trial at law, and a bill of exceptions taken, even though serious questions are raised upon which the Court of Errors may reverse the judgment. (See *Budson v. Benecke*, 12 Beav. 1.) And *a fortiori* when the court that tried the cause, and is applied to for an injunction, is fully satisfied of the correctness of its judgment. But even in such a case, when the bill of exceptions is not merely frivolous, as the litigation is not in fact terminated, and its result may be adverse to the complainants' title, it is necessary for the court to contemplate that as a possible result, and look at the consequences, in that event, of allowing or refusing the injunction. (See *Budson v. McAlpine*, 8 Beav. 229.)

Upon the particular facts of these cases I am of opinion an injunction should issue, unless within ten days after notice of the order, the defendants shall give a bond with sufficient surety, to be judged of by the clerk of this court, conditioned to keep an account of the quantity of cloth

made on each of the looms in question, and to file such account under oath, once in three months, in the clerk's office of this court, and to pay the amount of any final decree in the cause. And also that neglecting for the space of ten days to file such account, an injunction should issue.

It has been suggested that, as it appears this manufacture is not at present carried on to any profit, the complainants will receive no compensation for the use which may be made of their invention. But I apprehend that the account to which the complainants may be entitled, will not be of the general profits of the business, but of the profit made by using the patented improvement, in place of some other method of manufacture not patented. And if they shall so elect, they may waive an account of profits, and bring their action at law for damages.

Causten Browne, for the complainants.

Paine and Jenckes, (of Rhode Island,) contra.

*United States District Court. Massachusetts District.***THE SLOOP CANTON.****WILLIAM DERRY ET AL v. JACOB HERSEY.**

Services rendered on board of a vessel of 35 tons, engaged in transporting stone and lumber between Quincy and Boston, are maritime in their character, and the persons so employed have a lien on the vessel for their wages, which may be enforced in the admiralty.

And this lien is not affected by an agreement by the master with the owners to sail the vessel on shares, and "victual and man" her, even though this agreement be known to the seamen when they were employed.

A delay of two years will not prevent the enforcement of a lien for wages, where the ownership of the vessel remains unchanged.

The case of *The Louisa*, 2 Woodbury and Minot's Rep., 48, commented upon.

Full costs are to be taxed in admiralty causes, notwithstanding the decree be for a sum less than one hundred dollars.

This was a libel *in rem* for wages earned on board the sloop Canton, of 35 tons, during the summer of 1856.

The answer alleged, *First*, that the libellants were not

seamen, nor engaged in maritime service, and that no lien existed for such services; that the vessel was employed in freighting and laying stone in and about Boston, and between Quincy and Boston.

Second. That in accordance with the general custom at Quincy, this vessel was hired by the master on shares, and that he victualled and manned her; that this fact was well known to the libellants when they were hired by him, and that this custom and knowledge confined them to the personal liability of the master and precluded their having any lien upon the vessel.

Third. That the claim was stale, and no lien could be enforced at this time. And in support of each of these grounds of defence, the claimants relied upon the case of *The Louisa*, 2 Woodbury & Minot's Rep., 48.

SPRAGUE, J. This is a libel *in rem* for wages. The services are not denied; but the claimants in the first place, deny that the employment of the libellants was maritime in its nature, and this defence finds countenance in the case of *The Louisa*. That vessel was similarly engaged, and the only question actually decided in that case was whether after the expiration of three years, during which time the vessel had gone into the hands of *bona fide* purchasers, without notice of the claim, the lien could be enforced, and it was very evident that it could not. The libel was dismissed by the court on that ground alone, and therefore whatever other points may have been touched upon by the learned judge of the Circuit Court, they were *obiter dicta*, not necessary to the decision of the case. They were scarcely *dicta*, for the appellate judge merely indicated the inclination of his mind, without expressing any decided conclusion upon the questions. I do not, therefore, regard them as binding authority upon this court.

There is another case, however, of more direct bearing, and that is the case of *Thackeray v. The Farmer*, Gilpin's Rep., 524, in which case Judge Hopkinson refused to issue process for wages against a vessel of 42 tons, engaged in transporting fuel from Cooper's creek, across the Delaware River, to Philadelphia. The libel in that case alleged the services to have been rendered on the high seas, and that learned judge tried to draw a line of distinction which should exclude small craft engaged in local business, such as the transportation of fruit, provisions, or fuel, on the

Delaware; but some confusion appears to have existed in his mind touching the necessity for the services being rendered on the *high seas*, in order to give jurisdiction in admiralty, or a lien to those engaged on board. Now if such were the test, no service rendered on any of the navigable rivers could give a lien which could be enforced in the admiralty,—and there are many decisions sustaining such liens; and Judge Hopkinson himself held that the admiralty had jurisdiction *in rem* for wages earned in a steamer plying between ports on the Delaware river. *Smith v. The Pekin*, Gilpin's Rep., 203.

Now this vessel, The Canton, was engaged in navigating tide waters. She was enrolled and licensed as a coaster, which would not have been done had not the service contemplated been maritime in its nature. The evidence shows that the actual employment of the libellants was to load the vessel at Quiney, not as quarry men, but only to take the stone on board from a wharf, to navigate the vessel to Boston, and there to unload her. The vessel carried stone principally, but not exclusively. She also carried lumber, and one cargo of lime.

She was propelled by sails and the other usual apparatus: and the persons engaged on board of her must have been possessed of some skill in navigation. They must have steered, furled and reefed the sails, and brought her to anchor. They must have been able to hand reef and steer, a common criterion of ordinary seamanship. They ought also to have known the rules of navigation in regard to collisions, and had they negligently run afoul of another vessel, the owners of this sloop would have been held responsible for the damage. I cannot hold that the duties which these libellants performed were merely those of landsmen.

It is further urged, upon the authority of the case of *The Farmer*, that in order to make the service on a river maritime, and to give jurisdiction in admiralty, the vessel must be engaged in "commerce and trade." That learned judge does not extend this test to vessels employed on the high seas, and why that requisite should attach to vessels on one part of the water within the admiralty jurisdiction, and not to others, I am unable to perceive. A mere passenger vessel is not engaged in commerce or trade. A whaling voyage is only a hunting expedition. A vessel engaged in the exploration of the North seas is not employed

in commerce or trade. And yet in each of these cases, the services of the seamen are certainly maritime, and they have a lien therefor on the vessel.

It is urged that the laying of stone in the building of a wharf, is not maritime. This is true as an insulated service, but it may be so connected with and subservient to a far greater and more important contract that the whole may be deemed maritime. The general rule may be thus stated. If the contract is for the navigation of tide waters and the transportation of merchandise thereon, and the laying stone, which constitutes the cargo of a vessel, into the wall of the wharf as it is discharged, is merely incidental and subsidiary to the principal business, the whole service may be considered maritime. But if, on the contrary, the navigation is merely incidental and subsidiary to the principal business of the owner or hirer of the vessel, such, for example, as the transportation across a river of the stone to be used by him in the construction of a building upon which he is engaged, then the contract as a whole would not be maritime.

In this case the vessel was engaged in transporting stone and other articles of merchandise, upon tide waters. The master says that eight or nine trips were occupied in freighting wharf-stone, and in laying the wall of a wharf for which the stone was intended, and that upon each of such trips, an hour's delay was caused by laying the stone regularly, instead of discharging it upon a wharf in the usual manner. The master's book, however, shows only one such trip. But even though there had been nine, this was merely subsidiary to the principal business. And I do not think that a difference of eight or nine hours in six months' service, can deprive that service of its maritime character. These stones were hoisted out of the vessel in the usual manner, and were lowered into the side of the wall. This is but equivalent to an agreement by the crew of any other vessel to pile up the cargo on the wharf on arrival. It is only a variation of the *method* of unloading. I am therefore of opinion that these libellants were engaged in a maritime service, and that they are entitled to come into this court to enforce their lien for such service.

Second. The second ground of defence cannot be maintained. Supposing the libellants to be seamen employed

in maritime service, they have a lien on the vessel whether she be sailed on shares or not; and whether they knew when they were employed, or not, that she was so sailed, makes no difference. Whoever is the owner, the seamen have the vessel as their security, and they are not bound to ask any questions as to whether any arrangement has been made with third parties or not. They always know that there is *some* owner; and behind that owner's liability, whether he be the general or special owner, they have the *thing* to look to for their wages.

Third. There having been no change of ownership in this vessel, the position that the lien has been lost by delay in enforcing it is untenable, as no innocent third party is injured. It has been urged that a good practical limitation to these claims would be the time of settlement between the master and owners. This cannot be established as a fixed rule, because this settlement might be had immediately after the termination of the season; but if this settlement were not made till after a reasonable time from the termination of the employment, and the seamen should lie by and allow the owners to pay over to the master his share of the earnings without knowledge of the claim, then there would be force in the suggestion; but in this case there has been no settlement, and no injustice can be done by the enforcement of the claim at this time. A decree must be entered for the libellants.

A motion was made by the counsel for the claimants, that the costs of the libellants be taxed according to the St. of United States, 1847, c. 55, but the court ruled that the St. of 1853, c. 80, regulating fees in the United States Courts, was inconsistent in this respect with the act of 1847, and decreed full costs.

C. P. Curtis, Jr., for libellants.

H. F. Smith, for the claimants.

UTPADEL ET AL v. ROBERT FEARS.

The shares of fishermen, on mackerel voyages, who sail under the agreements usual in those voyages, are subject to contribution for general average.

This was a libel *in personam* promoted by several of the crew of the fishing schooner E. C. Haskell, of Gloucester, against the owner, to recover a balance alleged to be due them on settlement. This balance was withheld by the owner to pay the contribution which he claimed was due from them towards certain salvage and general average expenses, which were incurred on the voyage. The only question of law involved in the case was whether the shares of the fishermen, under the contract in this case, were liable to these deductions. There was evidence offered of a usage in the mackerel business to make and allow these deductions, but the opinion of the court on the law rendered it unnecessary to pass upon this evidence.

SPRAGUE, J.—The crew, in this case, shipped under the usual articles of mackerel voyages. By these articles the fish taken and brought home and delivered to the owner, are to be sold by him on joint account, and the proceeds of the sale are to be equally divided, one half to the owner, and one half to the master and crew. There are also, by established usage, certain deductions to be made for the expenses of coopering, packing and inspecting, and for bait. In the course of this voyage, and after all the fish had been taken, the vessel was overtaken by a storm off Prince Edward's Island, and, to prevent the vessel dragging and being driven ashore, her masts were cut away. While she lay dismasted, she was taken in tow by another vessel, which carried her into Charlotte Town, Prince Edward's Island, and there libelled the vessel and cargo for salvage. This claim was settled by the owners, and the vessel released and taken home to Gloucester, and the fish sold in the usual manner. The general average for cutting away the masts was apportioned, according to the established principles of adjustment, on vessel and cargo, and the salvage expenses were apportioned in the same manner. In settling with the crew the owner charges the whole fish with its contributory share of the salvage and general average

expenses, according to the adjustment, and the half which belonged to the crew bore its half of this contribution. The crew object that their shares or lays are, in fact, wages, and are therefore not liable to such contributions, but that it is the duty of the owner to bear all the expenses of sailing the vessel, including all expenses of general average and salvage, and that they are to have their clear half of the fish.

[The learned judge then examined the evidence on the subject of the cutting away the masts, and of the salvage, and decided that they were proper subjects of contribution, if the crew are bound to contribute, and that the adjustment was on correct principles.]

The salvors in this case had a lien on the fish, as well as on the vessel, and could, at their option, have proceeded by libel against both. If it had taken half the fish to satisfy this lien, then only half the fish caught could have been brought to port and delivered to the owner. Now, by the articles, it is not the fish caught, but the fish brought to port and delivered to the owner, out of which the payment to the crew is to be made. In such case, then, the crew could get only half of a half of the fish caught. If fish be lost by perils of the seas, it is a joint loss. Now, in this case, the owner paid the salvage, and thus relieved the fish from the lien. Instead of part of the cargo being thrown overboard to save the rest of the cargo and the vessel, the masts were voluntarily sacrificed to save vessel and cargo. On general principles, there can be no doubt that the crew, if to be treated as part owners of the cargo, should contribute to these expenses, and that if, on the other hand, the fish had been taken by the salvor to satisfy his claim on fish and vessel, or if fish had been voluntarily sacrificed to save the vessel and the rest of the fish, the crew would be entitled to a contribution from the owner for his interest in the vessel and in the fish. This is the just, equitable and established principle governing joint interests, exposed to common perils of the seas. The fish in this case is brought home, in specie, but subject to certain expenses and liens. The crew are to be paid according to the value of the fish as delivered by them to the owner. Its value is so much the less. It is as much the duty of the crew to bring the vessel and cargo back safely, as it is the duty of the owner to transport the fish safely in the

vessel. The peril is a common misfortune, and the relief from it a joint charge. The case is the same in principle as if the salvors had been paid at Prince Edward's Island in fish specifically, for the contributory share chargeable on the fish.

It is argued that the crew are in fact on wages, calculated on the fish brought in, and that whalemen and fishermen on lays are always treated as serving on wages. Several instances have been cited from the books, where the shares or lays are said to be like wages, and in the nature of wages, and the crew are held not to be partners or joint tenants with the owners in the oil or fish. *Baxter v. Rodman*, 3 Pick. 435. *Bishop v. Shepherd*, 23 Pick. 492. These cases go only to that extent. It has simply been found convenient to liken these shares to wages for certain purposes. In whaling voyages it has been held that the amounts due the crew, when ascertained, are in the nature of wages. But this proposition gives us no aid. The question how the amount is to be ascertained still remains and is the very question here. What deductions from the gross proceeds are to be made in ascertaining the amount due, and is general average contributions to be one of those deductions? If the money when due is to be treated as wages, still we must inquire, How much is due? But in some respects the claims of the fishermen are not like wages. It is doubtful if they have an action against the master, who is a joint share owner with them. All the court can do is, in each case, and as to each question that arises, to determine whether the claims are or are not to be governed by the analogy of wages.

It is settled that seamen's wages are not liable to general average contributions. The only reasons I find assigned for this exemption are those given by Abbott and Kent. They are, *first*, because seamen might otherwise be unwilling to make jettison; and *second*, the hardship of diminishing their wages without fault on their part after all the perils, privations and labors they have undergone. Neither of these reasons is to me entirely satisfactory. The latter consideration has not prevented the enforcement of a forfeiture of all their wages in case of a total loss of vessel and freight; and as to the former, it may with equal truth be said that if their wages are exempt from contribution, they may be too ready to shorten their labors, and seek

relief too speedily from danger, by sacrificing the cargo, the property of others, which is under their charge. Another and better reason for the exemption is, that a seaman on wages does not stand on an equality of risk with those who have property in or on board the vessel. His wages are due to him by a contract for labor and skill, and for which, upon the general principles of hiring, he should be equally entitled to compensation, whatever may be the result of the enterprise. But from reasons of policy in this particular kind of hiring, the wages are lost if there be a total loss of the vessel and cargo, but the encroachment upon the general principles of contract has gone no further. It is only in case of an actual total loss of vessel and freight that the wages are lost. If all that is saved is equal in value only to the amount of the wages, still they must be paid in full; as it is often expressed, the wages are nailed to the last plank. Wherever, therefore, the danger is only of a partial loss, the wages are in no peril, and they ought not to contribute to a sacrifice made to avert or diminish a danger to which they were never exposed. Take a case like the present, where the only danger is of stranding at a place where it is quite certain that parts, at least, of the vessel and cargo will be saved. Why should seamen on wages contribute to a sacrifice of the masts, made merely to diminish a partial loss, which was to be suffered by the owners of the vessel and the property on board? And such cases are very frequent; indeed, it is only in cases of partial loss that any question of contribution can arise, and in those it can rarely be shown that a seaman on wages had anything at risk, or derived any benefit from the sacrifice. As a general rule, therefore, upon the true and strict principles of average, a seaman on wages ought not to be called upon to contribute. But fishermen stand in a very different position. Their compensation is so bound up in the fish which they have taken that a partial loss of the latter carries with it an equal loss of the former. If by a peril of the sea one-half or three-fourths of the fish are destroyed, the men lose the same proportion of their compensation. If in this case the vessel had gone ashore, and a portion of the fish on board had thereby been destroyed, the libellants would have lost the same proportion of the fruit of their labor. They have the same interest therefore in diminishing a partial loss which the owners of the vessel or of

other cargo have, and thus stand on an equality of risk in all cases. Beside this, in case of jettison, those who are to select the articles to be sacrificed should be in a position of impartiality, which would not be the case with fishermen if they could neither claim nor be subjected to contribution. They would be strongly tempted to select any other article, and sacrifice every other species of property, rather than the fish which they had taken.

General average rests on two principles; first, a principle of equity, that all who are equally exposed to a common danger shall contribute to indemnify one whose property is sacrificed for the common good; and second, a principle of policy that those who are to determine, personally or through agents, what property shall be selected for the sacrifice, shall be placed in positions of impartiality. Fishermen, in my opinion, come under this principle of equity, and should be governed by this rule of public policy. I am therefore of opinion that the shares of fishermen under these contracts, are liable to general average, and are entitled to the benefits of general average.

Libel dismissed.

C. G. Thomas, for libellants.

R. H. Dana, Jr., for respondents.

United States Court of Claims.

[Reported by J. T. Devereux.]

GRIFFING v. UNITED STATES.

Assessment on land purchased for United States—Agreement by Secretary of Navy to recommend purchase—Effect of subsequent act.

On September 19, 1846, the claimant, in a letter to the Secretary of the Navy, stated: "Having for some time been in treaty with the owners for the purchase of the property lying between the Navy Hospital and Navy Yard in the city of Brooklyn, with a view to selling it to the Government, and not wishing to incur so heavy a responsibility without having some guaranty that they would take it at

a given sum," &c. Again, on November 16, 1847, he wrote: "Referring to my former letter to you on the same subject, I have entered into written contracts for the purchase of all the ground, &c., and am now prepared to realize a sale of the same to the Government should they desire to purchase," &c. The Secretary, in his answer thereto, of December 11, 1847, stated that he was "willing to recommend to Congress the appropriation of \$285,000 for the purchase of the land." With the correspondence between Mr. G. and the Secretary, and the latter's recommendation before them, Congress, by the act of August 3, 1848, (9 Stat., 268,) made an appropriation of \$285,000 for the purchase by the Secretary of the lands in question—"Provided that no part of said sum shall be applied to the payment of the purchase money until a good and perfect title is secured to the United States for the said lands and their appurtenances."

On June 26, 1848, the Common Council of Brooklyn adopted an ordinance to grade a portion of Flushing avenue, &c. An assessment was made, and the assessment roll reported to the Common Council, and finally confirmed July 12, 1848. It did not appear when "the grade line" was adopted, or when the grading was done.

No information in respect to the grading or the assessments was given either to the Secretary or to Congress, until after the appropriation was made.

The petitioner claims that the United States were bound to pay the assessments, or to exonerate him for his liability therefor, and that they still owe him the \$30,000 which was retained for the assessments. He insists that the Secretary's letter of December 11, 1847, and his reply thereto, constituted a contract for the purchase of the land by the United States, which though unauthorized when it was made, was yet ratified and confirmed by the act of August 3, 1848.

The act of May 1, 1820, section 6, (3 St., 508,) declares that no contract shall be made by the Secretaries of the Navy, &c., "except under a law authorizing the same, or under an appropriation adequate to its fulfilment." And section 7 of the same act provides that "no land shall be purchased on account of the United States, except under a law authorizing such purchase."

BY THE COURT,—SCARBURGH, J. Held, The Secretary's

object, in his letter of December 11, 1847, was to obtain the authority of the petitioner to say to Congress that the purchase could be made at the price specified, if Congress should desire it. Neither the Secretary nor the petitioner understood that the Secretary had the power to make a contract for the purchase. The Secretary proposed to recommend to Congress to make an appropriation for the purchase of the land on certain specific terms, and the petitioner acceded to his proposal. This was not a contract for the purchase of the land. It was, at most, an undertaking on the part of the Secretary that he would advise Congress to make the purchase on the terms which had been arranged between him and the petitioner. To ratify that act of the Secretary, therefore, would amount to no more than an approval of his advice. It would not be the adoption of his contract, for he made none. The Secretary recommended the purchase under the impression that for the purchase money suggested by him, a good and perfect title to the land was to be given to the United States; and Congress, acting upon this recommendation, and strictly conforming to it, made the appropriation upon the express condition that "a good and perfect title" should be secured to the United States. The act of Congress contemplates a purchase to be made, not the ratification of one which had already been made. When the appropriation was made, the petitioner had already become indebted to the city of Brooklyn for the amount of the assessments, and the land in question was subject to a lien therefor. A good and perfect title, therefore, could not be given until this lien was removed. In requiring its removal, the Secretary of the Navy but complied with the plain requirements of the said act of Congress under which he acted.

The petitioner is not entitled to relief.

EGLESTON AND BATTLE v. THE UNITED STATES.

Claim for return of duties illegally exacted upon importations of iron—Dutiable value under tariff act of July 30, 1846—Appraisement when unlawful—Extent of the authority of appraisers.

This was a claim for return of duties paid under protest on importations of iron in 1849.

The whole of the iron so imported was purchased for cash at Liverpool in January, February, and March, 1840,

at the prices stated in the invoices and entries, and those prices were the cash market value of the iron, at the city of Liverpool, at the several periods when the purchases were made. In the interval between the purchases and the several shipments, such iron rose in price. The appraisers, under instructions from the Secretary of the Treasury, estimated the value as of the time of shipment, and not as of the time of purchase.

Held, That under the act of July 30, 1846, §8, the appraisers had no authority to consider the value at the time of exportation, except as a means of ascertaining the value at the time of purchase.

The object of the laws then in force seems to have been to tax the importer on the amount or value he had expended. Where, therefore, the appraisers considered only the value at the time of exportation, and by their appraisement ascertained that value, and that value alone, and it was different from the value when the purchase was made, the appraisement was illegal. This is not inconsistent with the doctrine, that where the appraisers act within the legitimate sphere of their duties, their appraisement is final.

Their powers are special, and can be lawfully exercised only within the limits prescribed for them. Inasmuch, therefore, as, in this case, the power of the appraisers was, by statute, confined to the ascertainment of the value at the time of the purchase, when the question is, whether they undertook to ascertain some other value different from that at the time of the purchase, it is a question of "power in the officer."

Such a question may properly arise, and if it be determined that the exercise of the power here was confined to ascertaining the value at the time of the exportation, then the act of the appraisers was invalid and unlawful.

The protests made by the petitioners, whether they be such as were required by the act of Feb. 26, 1845, (5 St., 727,) or not, show that the money, the repayment of which the petitioners are now claiming, was paid by them involuntarily. They were forced to make the payments by the collector, *colore offici*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period. That money was thus obtained by a moral duress not justified by law.

Bill reported in favor of petitioners for \$1,158.40.

NAHUM WARD v. THE UNITED STATES.*Claim upon "loan office certificates."*

The petitioner holds 43 loan office certificates of the United States, for \$400 each, dated Dec. 23, 1777, payable to bearer on Dec. 1, 1781, with interest annually at 6 per cent. and purporting to be for value received. At the bottom of each is the following: "Countersigned by order of J. A. Trentlen, Governor of Georgia. E. Davies, Jr."—On 29 of them was endorsed: "Four years interest to Dec. 23, 1781. Paid in bills of exchange. Jno. Hillegas, Cont. Treas."

On Feb. 22, 1777, Congress resolved that thirteen millions of dollars be borrowed on loan office certificates. A resolution of Congress of Oct. 3, 1776, provided that this class of certificates should be countersigned by the commissioners of one of the loan offices, which for convenience of the lender were established in each of the States, commissioners to superintend such office being appointed by the States respectively, which were responsible for such their appointees.

On August 3, 1780, Congress resolved that, on account of the then invaded condition of Georgia, the papers of the loan office there should be removed for safety, and that until reestablished, the Treasurer of the United States be empowered to pay the interest on certificates issued from that office.

On March 29, 1782, the Secretary of the Treasury (Hamilton) reported against these certificates; and again in 1795 the Treasury reported to the same effect, because, among other reasons, there was no evidence as to the appointment of Davies as commissioner of loans. In 1816, and again in 1852, there were adverse reports.

It was contended on the hearing, that the claimant was bound to show, in addition to producing the certificates themselves, that the United States received a consideration for them, and also that E. Davies was a loan office commissioner for Georgia.

Mr. Peter Force testified that in 1846 he procured from a box of refuse papers at an auction room in Washington, two sheets of loan office certificates, which had been cancelled at the Treasury. They were of the same emission with those now in dispute, signed by Hillegas, and countersigned by E. Davies, and on each of them the interest was

endorsed to the 23d December, 1781. The certificates were produced in court by witness. It appeared also that the claimant was *bona fide* holder of the 43 certificates.

BY THE COURT.—GILCHRIST, C. J.—*Held*, The position that the claimant is bound to show, in addition to the evidence furnished by the certificates themselves, that the United States received a consideration for them, is entirely untenable. Each certificate acknowledges that the United States have received \$400, and until that admission is shown to be the result of fraud or mistake, it is conclusive evidence of a consideration.

These certificates from the loan office in Georgia, supposing them to be valid, were properly presented at the Treasury for payment of the interest.

The resolution of October 3, 1776, does not require that the commissioner of the loan office shall describe himself as such commissioner. It is requisite only that the person who is actually commissioner shall countersign the certificates. These certificates were signed by order of the Governor of Georgia, and if any additional proof were required that Davies was a loan office commissioner for Georgia, it would be found in the fact that they went from the hands of the Governor to those of Davies, there being nothing to show that they came fraudulently into his possession.

When the interest was paid, and when the transaction was fresh in the memories of all, no objection was taken that the certificates were not properly countersigned. It was not until 1792, eleven years afterwards, that this alleged defect was discovered. Those considerations go very far to prove that Davies was the actual commissioner.

If, subsequently to the payment of the interest on these certificates of the same emission, and countersigned in the same manner [those discovered by Mr. Force] were received at the Treasury and cancelled, the presumption is that they were paid at the Treasury.

The circumstances admit of no other explanation than that these certificates were recognized by the various officers of the United States as countersigned by the proper officer.

The United States are justly indebted in the amount due on the forty-three certificates, with the interest thereon; estimating the certificates at \$282.44 each.

Blackford, J., dissented.

*Supreme Court of Vermont. General Term — Woodstock.
Nov., 1858. Windsor County.*

In re B. F. GREENOUGH.

Surrender of fugitive from justice — Constitution of United States.

This was a proceeding to release the relator from imprisonment, by virtue of a warrant issued by the governor of this State, upon the requisition of the governor of the State of Illinois. The accompanying papers showed that the relator stood indicted in the State of Illinois for the alleged crime of obtaining money by false pretences, upon the sale of a certain recipe for rendering burning fluid and camphene non-explosive, the recipe containing no such quality and this well known to the relator, and wholly unknown to the person alleged to have been defrauded.

It appeared that by the statutes of the State of Illinois this offence is punishable by fine and imprisonment in the State prison. The question was whether the offence came within the provision of the United States Constitution requiring the surrender of fugitives from justice.

Held, that the words "treason, felony or other crime," used in the United States Constitution to define the offences where such surrender is required, are to be understood as extending to every class of criminal offence above the grade of misdemeanor. That larceny and its kindred offences of embezzlement and obtaining goods and money by false practices and pretences, have always, since the adoption of the United States Constitution, been regarded as crimes within this provision of the United States Constitution.

It was further decided that the court of this State will not, in such cases, inquire whether the form of the indictment is sufficient, or whether the relator is guilty of the offence charged; but if the provisions of the act of congress have been complied with, and the offence charged comes within the provision of the United States Constitution, will leave the relator to his defence in the tribunals of the State where the offence was committed.

NOTE. — In the case of *Harrington v. School District*, ante p. 405, the employment of plaintiff was by the Prudential Committee, and not by vote of the District.

Windham County, Nov., 1858.

WHITNEY v. RICHARDSON.

Claim for betterments — Defective title — Notice.

If one making entry upon land, under color of title, supposed at the time of such entry, that he obtained good title in fee simple, although he purchased of one who was but a tenant for life, and whose title was upon record in the office of the registry of deeds, he is nevertheless entitled to recover of the owner of the fee, the additional value to the land, produced by any permanent improvements which he may have made thereon.

The record notice of the character of the title of his grantor is not sufficient to defeat his claim for such improvements, on the ground of their having been made *mala fide*. Actual notice of the defect in one's title will defeat all recovery of the owner of the fee for such improvements, either by the person making them, or his grantee, although purchased by such grantee in good faith and for full consideration.

MILLER v. SAWYER.

Co-sureties.

When one of two co-sureties took of the principal, security for his proportion of the burden, supposing he had the right to do so, but without informing his co-surety, upon which he ultimately recovered to the full extent of his loss, it was held that the co-surety was entitled to the benefit of the avails of such security.

In this case the security was taken before the sureties had been compelled to pay the debt. After that and the equalizing of the burden among themselves, each may collect his own advancement and retain it without being liable to share with his co-surety.

But until the determination of the community of interest subsisting among co-sureties, by arrangement among themselves, there is an implied duty upon each to bring all the indemnity he obtains from the principal into the common stock of avails to relieve the common burden.

Orange County, Nov., 1858.

BANK OF NEWBURY *v.* BALDWIN.

Lever of execution on land — Neglect of sheriff.

Where the creditor delivers a writ of attachment to the sheriff, with directions to attach the real estate of the debtor, which he fails to do through some defect in his return, and after judgment the creditor delivers the execution to the same officer, and gives no directions in regard to the mode of service, and the sheriff makes no return upon the execution, and in the mean time other creditors levy upon such real estate, the sheriff is liable only for nominal damages for not returning the execution.

An officer is not only not liable for neglect to levy an execution in his hands upon the real estate of the debtor, without instructions, but it would seem he would render himself liable to the creditor for all damages by reason of so levying an execution, the statute not providing for such levy, except upon the request of the creditor.

CHAMBERLAIN ET AL *v.* SCOTT.

Contract — Quantum meruit.

Where the plaintiff sues upon a contract for service rendered under a special contract, which he had failed fully to perform, in consequence of the interposition, or failure to comply with some condition precedent, on the part of the other party, he is entitled to recover,

1. Upon a *quantum meruit* for what service he has rendered the other party. And in this action he is not restricted, in the amount of his money, to the contract price; or,

2. He may sue for damages, by reason of not being allowed fully to perform the contract. In this form he will recover for the portion of the contract already performed, and such damages as he may have sustained by reason of not being allowed to perform the whole contract.

But he cannot hold himself in readiness to perform the whole contract, and thereby entitle himself to recover the stipulated compensation for entire performance.

DE FOSSE v. DE FOSSE.

Contract — Quantum meruit.

In contracts for labor to be paid in the use of land to raise a crop, if the party fail fully to perform the amount stipulated for the use of the land, he may nevertheless recover what he has benefited the other party. This is to be determined by deducting from the value of the use of the land or the crop, the damages which the other party has sustained by the deficiency in the performance of the contract on his part.

WOODWARD v. FRENCH.

School district — Lists.

In Vermont, school districts are required to assess taxes upon the lists of the inhabitants of such districts, at the date of the vote under which the assessment is made. The listers of the town are required to designate the lists of the several school districts, in making up the grand list of the town, and it is provided that such lists shall remain the list of such school districts until another is made in like manner.

It was held that a person who is an inhabitant in a school district, and has a list in town, properly designated as part of the list of such district, is liable to taxation there, throughout the year, notwithstanding his removal into another district.

ATKINSON v. STEVENS.

Equity — Reformation of deed.

This was a bill in equity to reform a deed executed more than forty years since. The testimony was circumstantial mainly, and, in some respects, conflicting.

Held, that to justify a court of equity in reforming a deed or other contract, the evidence must be clear, satisfactory and conclusive; that the contract as executed by the parties does not express the purpose and intention of the parties. The testimony in this case not making such a case, the bill was dismissed with costs.

Windsor County, Nov., 1858.

DUNHAM ET AL v. DOWNER ET AL.

Principal and surety — Effect of judgment — Granting delay.

In this case the plaintiffs executed a note as sureties for Aikins, one of the defendants. The note was sued and judgment recovered against them and the principal. This judgment was purchased by defendant, Downer, and subsequently, by a contract between Downer and the principal, Aikins, it was agreed, for valuable consideration, without the knowledge of the sureties, he should give day of payment, which he accordingly did, beyond the terms of the contract as then existing. The judgment was afterwards sued and the sureties attempted to defend upon the ground of the contract to delay payment, as above stated. The court held that at law such defence is not available to the surety after the debt has gone into judgment, the relation of principal and surety being so merged by the judgment that at law the surety cannot make it a ground of defence.

Held, that the party having no remedy at law, is nevertheless entitled to a remedy in equity, the same as if no judgment had ever been rendered upon the contract. This subject being one of original equity jurisdiction, courts of equity will still exercise it in all cases where their interference is invoked, and especially where redress at law is denied.

HUTCHINSON v. ONION.

Overpayment to executor by mistake.

This was a bill in equity to compel defendant to restore money which he is alleged to have unjustly obtained out of property assigned to the plaintiff for the benefit of the creditors of certain parties, and which money so obtained by defendant, the orator had, in rendering his account as trustee, been compelled to account for to such creditors.

The defendant is alleged to have obtained such over allowance through the mistake and misapprehension of the orator, and the fraud and misrepresentation of the defendant, he acting as administrator of his father's estate, which

has been subsequently settled and the money so obtained, if any, distributed to the heirs.

The court were not satisfied upon the proof, that the defendant was guilty of any fraud or misrepresentation in the matter, and they held if money had been obtained through the mistake of the orator, beyond what defendant, as administrator, was entitled to retain, he cannot be decreed to refund it after the same has been distributed to the heirs by a decree of the Probate Court.

BOWEN *v.* TRACY.

Corporation — Evidence of organization.

Where a corporation is chartered and proceed to do business under the corporate name, for many years, until they become insolvent, there being no records kept and no express proof of any organization—

Held, that these facts constitute a corporation *de facto*, and are sufficient evidence of the organization and existence of such corporation, in ordinary suits, either in favor of or against the company.

But *held* also, that where the persons named as corporators in the act of incorporation, had been, prior to such act, carrying on the business of the corporation as a partnership, and subsequently continued to own the entire stock of the corporation and to conduct its operations; and after finding that the business could not be conducted upon the credit of the corporation, all but the defendant from time to time signed the company paper as sureties, with the knowledge of the defendant and upon his urgent remonstrance against the other corporators conducting the business solely on their own account, and urging that it should be carried on for the joint benefit of all, saying, "If we gain we will have it, and if we lose we will share it;" it was *held* that the defendant was liable to contribute to the losses so incurred by the other corporators.

That they might maintain a bill in their joint names against defendant for his share:

That the fact of there being other debts of the company still unpaid, to which all are liable to contribute, was not a valid objection to adduce in this case.

DOWNER v. TUCKER.*Promissory note not negotiable.*

A promissory note made payable to bearer "when a certain lease is given up," is not payable absolutely and without any contingency, and is not therefore negotiable according to the rules of the law merchant. No action can therefore be maintained thereon by any person or bearer, unless he be the original payee to whom the note was executed.

Washington County, Nov., 1858.

NICHOLS v. NICHOLS.*Adultery during insanity no ground for divorce.*

This was a libel for divorce *a vinculo*, for the adultery of the wife. The defence was that she was insane at the time. The court were satisfied of the facts alleged, both in support and defence of the libel, and were not satisfied that the act complained of was done in a lucid interval.

The court held that general insanity is a full defence for all acts which by the statute are grounds of granting divorce. In regard to severity and desertion there could be no question. There is wanting the consenting will, which is indispensable to give the acts the quality either of severity or desertion. The case is the same in regard to acts of sexual intercourse with one not the husband. If done by force, or fraud, no one could pretend that it formed any ground of dissolving the bonds of matrimony. And insanity is even more an excuse, if possible. It not only is not the act of a responsible agent, but in some sense it might fairly be regarded as superinduced by the consent or connivance of the husband, since he has the right, and is bound in duty, to restrain the wife, when bereft of reason and the power of self-control, from the commission of all unlawful acts, both to herself and to others.

If the husband, knowing of the wife's propensity to self-destruction, suffered her to take her own life, he could be regarded as scarcely less than a murderer himself. So too in regard to the act complained of. It was in the power of the husband always to guard against such consequences. And if he failed in this duty he surely could not ask the court to visit the consequence of his own misconduct upon

the unfortunate being, whom having sworn to love, comfort, honor, and keep in sickness and in health till death, he had chosen to abandon to the short charity of a proverbially heartless world, in the hour of her utmost necessity.

And if the case were shown, of those to whose care the husband had prudently entrusted his wife for care or for cure, (as he might lawfully do,) having betrayed and abused this confidence to purposes of crime on their part, as might possibly occur without his fault, he surely could not blame his insane wife for the treachery of his own agents or their assistants. In insanity it is well known that the subject is liable to such illusions as to mistake utter strangers for the nearest relatives. If, too, they retain only the ordinary stimulus of propensity at such a time, with no power of self control, they are, of course, at the mercy of every base man. But in many cases sexual propensity is more or less exalted during insanity, and the liability to such contingencies proportionally increased.

In such cases for the husband to seek for a dissolution of the marriage relation must argue great weakness, or great depravity. We have read the case of *Matchin v. Matchin*, 6 Barr. 332, and the opinion of the late Chief Justice Gibson, where he attempts to maintain that the adultery of the wife, although insane, is sufficient ground of divorce, for the reason that it tends to impose a spurious offspring upon the husband. The reason is one which will have no application to similar acts committed by the husband, and as applied to the wife, seems truly revolting to all just sense of propriety and decency. We are surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American republic.

Rutland County, Nov., 1858.

BANK OF THE REPUBLIC v. BAXTER AND OTHERS.

Fraud — Allowing others to act under delusion — Delivery.

This is a bill in equity to compel the restoration of money fraudulently obtained from the plaintiff. The plaintiff had been accustomed to issue certified checks to certain limited amounts, in favor of A. S. Baxter, upon credit. This practice had continued for a number of years, as is

the common custom with many of the banks in the city of New York, in regard to their customers, it being understood that such customers shall deposit the amount for which such checks are certified, in the course of the same day, within business hours.

Baxter had been a man of considerable property, but at the time of the transaction in question had no means beyond the shreds and fragments of fancy stocks which adhere to a Wall street broker when his fortunes become desperate, and the hope of some successful speculation turning up in relief of his broken fortunes; when he obtained this check for \$7,500 to meet a debt he owed his brother, in Rutland, Vt. His brother had directed him to deposit the money in the Metropolitan Bank, N. Y., to the credit of the Rutland Bank, Vt., for the benefit of H. H. Baxter, but without any communication with the Metropolitan Bank.

A. C. Baxter deposited the check during banking hours of the day it was obtained, and wrote his brother by the mail of the same day, informing him of the deposit. The Metropolitan Bank informed the Rutland Bank of the deposit by the first mail also.

Upon discovery of the fraud at the close of the business of the day, the plaintiffs insisted that A. S. Baxter should countermand his notice to his brother, by telegraph, which he did; and the Metropolitan Bank did the same in regard to the Rutland Bank, but had before passed the money to their credit, which on settlement was allowed them, at the close of the business of the day or of the week. The first information H. H. Baxter had in regard to the deposit was that it was countermanded; and so of the Rutland Bank, who accordingly retained the money till secured, that it should be ultimately paid to the party entitled.

This bill was brought to determine that question. The court *held* that although A. S. Baxter made no positive representation on the day he obtained this check, in regard to his solvency, yet as he knew the plaintiffs were acting upon the belief that he was a man of property, and would not give the certificate except upon that belief, his allowing them to so act upon what he knew to be a delusion, was as much a fraud as if he had positively represented himself at the time to be solvent, and that the whole transaction was therefore void as to him, and that as there had been no communication between H. H. Baxter and the Metropolitan Bank

and no notice of the deposit until after the countermand by telegraph, no such right to the money had vested in him as to entitle him to hold it against the plaintiffs. A decree therefore passed for the orator.

Caledonia County, Nov., 1858.

BLODGETT v. BICKFORD ET AL.

Principal and surety — Promissory note.

This was an action upon a promissory note where the defence was urged on behalf of the defendant not named, who signed the note as surety for Bickford, this relation being known to the plaintiff at the time he took the note. The note was payable on time, and before it became due Bickford and the plaintiff made an arrangement by which Bickford transferred to plaintiff the right to sell a patent right (in certain districts,) which Bickford had applied for and expected soon to obtain, (but which in fact he failed to obtain,) and in consideration of this transfer the plaintiff gave up the note to Blodgett as part payment towards the right thus transferred.

Held, that after the failure to obtain the patent the plaintiff was entitled to recover upon the note as having been surrendered through mistake, and that the surety could not defend the action upon the facts above stated, without showing that his conduct or relations towards the principal had been changed in consequence of the surrender of the note. The surety had been informed of the surrender of the note before the plaintiff gave notice that he should hold him responsible for its payment, which he did in a reasonable time after being informed of Bickford's failure to obtain the patent.

RUGGLES ET ALS v. BICKFORD.

Sale — Warranty — Notice of defect in reasonable time.

This was an action to recover the agreed price of a mower, ordered by defendant and forwarded according to order. The defendant purchased the article for a third party, but this was not known to plaintiffs. The party for whom the plaintiff purchased the machine attempted to use it, but finding it required more power than he could afford,

laid it aside. No notice was given plaintiffs of any defect claimed in the machine till after suit brought. The machine was sold under a warranty that it would answer the purposes for which it was sold, as is implied in all similar cases.

Held, the defendant was entitled to no deduction on the price, it not appearing that defendant suffered any loss on account of any defect in the machine, and the presumption being, in the absence of notice of defects in the machine in a reasonable time, that it did answer the purpose for which it was purchased.

PRACTICE.

Superior Court for the County of Suffolk.

BOWKER v. GRAFTON MANUF. COMPANY.

Motion to dismiss—Form of summons to stockholder under Statute 1851, c. 315.

HUNTINGTON, J.—This is a motion to dismiss, alleging that it appears by the officer's return that a summons of the writ was left at the last and usual place of abode of Perkins, and referring to the return of the officer. The return states that Perkins was an alleged stockholder in the defendant corporation, and that the officer "left a summons of the writ" at his last and usual place of abode. The motion then alleges that he "produces the said original summons," and that it is wholly insufficient and defective. The defect relied on is, that it does not run to the stockholder Perkins, and that his name nowhere appears on it. It will be perceived that the motion contains traversable matter, and that the facts relied on to abate the suit do not appear upon the record, including the return of the officer. Whether the paper produced and annexed is the original summons, is a fact upon which the plaintiffs have a right to take issue. There being nothing upon the record or return of the officer to show that the suit cannot be maintained, the motion to dismiss must be overruled. *Amidown v. Peck*, 11 Met. 467, and cases there cited.

Whether the stockholder might not have pleaded the

matter in abatement, is not now before us. See *Simonds v. Parker*, 1 Met. 511, and *Jacobs v. Mellen*, 14 Mass. 135.

Whether, if pleaded, it would avail, may be considered doubtful, since the decision in *Holyoke Bank v. Goodman Paper Manuf. Co.*, 9 Cush. 576, where it is held that in the absence of any rule of court prescribing the form of proceeding under the statute of 1851, c. 315, and from the naked provision in that act, which merely requires a "summons in the action" to be left with the stockholder, it is not necessary to describe or name a stockholder in the writ or declaration, in order to charge him. There seems to be much force in the suggestion of the plaintiff's counsel, that the insertion of the name of a stockholder in the summons by the plaintiff's attorney, without the authority of the court or the statute, can give no additional validity to the service. If it does not, the case in 9 Cush. would be decisive in this.

Charles F. Blake, for plaintiffs.

Wm. N. Davis, for defendants.

EMERSON v. SNOW.

Venue — Jurisdiction of Justices' Court — Sts. 1852, c. 314 — 1856, c. 152.

This was an action originally brought in the Justices' Court. The damages were laid at \$100, and the defendant was described as "of Harwich, in the County of Barnstable, now of Boston, commorant." The action was tried upon the merits in the court below, and resulted in a judgment for the plaintiff, from which judgment the defendant appealed. In the Superior Court the defendant first raised the objection of want of jurisdiction, and moved that the action be dismissed for that cause. The plaintiff maintained that, though want of jurisdiction of the subject matter could not be waived, yet, want of jurisdiction of the person might, and that in this case it had been waived by the defendant by his appearance and answer to the merits in the court below.

Held, Allen, C. J., delivering the opinion of the court, that this case was unlike that of an action in the Common Pleas which is brought in the wrong county, for there the objection is not to the jurisdiction. The court has juris-

diction in that case, but it is provided by statute that, if the action be brought in any other county than that in which one of the parties lives or has his usual place of business, the writ shall be abated and the defendant have double costs; and, consequently, the defendant must plead in abatement at the proper time, or be held to have waived his objection. Here, however, the statutes of 1852, c. 314, §1, and of 1856, c. 152, extend the jurisdiction of justices, &c., to cases in which the damages are laid at over \$20 and less than \$100, only "provided the defendant resides or has his usual place of business in the county where the action is brought," and as the defendant is alleged in the writ to be a resident of another county, and is not alleged to have any place of business within the county, there appears on the face of the writ an absolute want of jurisdiction, which cannot be waived, but may be taken advantage of at any time.

Action dismissed.

John W. Emerson, for plaintiff.

Uriel H. Crocker, for defendant.

JACKSON v. RICHARDS ET AL.

Pleading — Demurrer and answer combined.

After an affidavit of merits a paper was filed combining an answer to the merits and a demurrer. *Held*, that these two, filed at the same time, and in the same document, were wholly irreconcilable. There was the additional objection to the demurrer that it was filed too late; being after the affidavit of merits. The demurrer was therefore ordered to be stricken out from the answer, leaving merely an answer to the merits.

QUINCY v. TRAIN ET AL.

Answers to Interrogatories — Form of jurat.

Per Morton, J. Answers to interrogatories held to be bad because interlined between the interrogatories, and not on a separate paper.

Also bad because the answers did not appear to be properly signed and sworn to. They were signed in the firm name "A. & B." and the jurat simply was "Signed and sworn to before me, H. F. Durant, Justice of the Peace." But it did not appear who made the signature or took the oath.

Supreme Court of California.

FREMONT v. CRIPPEN.*

*Forcible entry—Possession of stranger to record—
Effect of judgment.*

BY THE COURT.—It appears that Fremont commenced an action against a corporation called the Merced Mining Company and Smyth Clark and John Vandewater, for a forcible entry upon "the upper drift of a shaft of a certain mine, called the Josephine Vein," in Mariposa county.

The jury rendered a verdict of guilty as to Clark and Vandewater, and not guilty as to the corporation. Judgment was rendered upon the verdict, awarding possession to plaintiff, and a writ of restitution issued, which was placed in the hands of defendant for execution.

This process the sheriff refused to execute, alleging as an excuse, first, that the mine was in the possession of neither Clark nor Vandewater, but certain persons claiming to hold under the Merced Mining Company, in whose favor a verdict of not guilty was returned. Second, that since the entry of the judgment the tunnel described had been deepened, and that, under the writ, he could only put plaintiff in possession of such portion as had been excavated at the time judgment was recovered.

The judge below, on application of plaintiff, awarded a peremptory mandamus against the officer, and from this order an appeal is taken.

The refusal of the sheriff to execute the writ seems to be based on the hypothesis that the verdict of the jury was equivalent to a finding that the Merced Mining Company were in the lawful possession of the premises at the time of the trial.

The verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry, that unlawful and forcible entry on his possession was made by defendants, Clark and Vandewater, and that the Merced Mining Company did not participate in the trespass. The peaceable and actual possession of the

*The Daily Advertiser, from which we take the above report, asserts it be understood that another decision is to be given in the Biddle Boggs case which will sustain Col. Fremont's title to the minerals.

plaintiff is incompatible with the lawful possession of another, and the verdict is conclusive against the possession of the Merced Mining Company.

The question then arises, whether, under the writ, the sheriff is authorized to dispossess parties who are strangers to the proceeding.

The object of the statute concerning forcible entries is to afford parties, whose possession is disturbed by force and violence, a summary remedy.

This object would be entirely defeated if a defendant, after judgment, could, by transferring the possession to a stranger, prevent the execution of the writ.

"If it were once permitted for a defendant against whom there was a judgment on a forcible entry and detainer, to put in a third person, or for a third person to enter afterwards, with a view of again putting a plaintiff's title to the rack, such third person might again, in his turn, after judgment against him, put another in possession or permit him to enter. So that there might be prosecutions without end, and the object of regaining possession by the plaintiff would be as far off as at the commencement of his first remedy to regain his possession, to the utter subversion of all justice." (*State v. Gilbert*, 2 Bay, 355.)

The second reason assigned for the refusal is frivolous, and requires no notice at our hands.

There being no error in the record, the judgment is affirmed.

NOTICES OF NEW PUBLICATIONS.

THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES. By JOHN CODMAN HURD, Counsellor at Law. "Moribus antiquis res stat Romana virisque." *Ennius, apud Cic. de Rep.* In two volumes. Vol. I. Boston: Little, Brown & Co. New York: D. Van Nostrand. 1858.

This book is one of no common merit. It commends itself especially to all legal students who appreciate the value of exactness in the discrimination of ideas, and the use of language. The title might seem to indicate that it was merely a new addition to the teeming literature of slavery, but such is not the fact. The purpose of it is well stated in the preface, as an "examination of the laws of the United States affecting personal condition;" it is not, therefore, an investigation into the laws regulating the *status* of slavery merely, but of freedom also.

What the author intends by "the laws of the United States" is shown in the clear and full statement which we quote below. The reader will

observe that he includes among those laws, the constitution and statutes as well of the several States as of the Union; we may add that the reader will get some notion from this passage of the need one has to keep his eyes well open, in following the acute analysis of our author.

"The distinction of the laws of the United States into laws which are either national or local in their extent, which distinction is founded upon the political character and territorial jurisdiction of the sovereign power from which they proceed is, as has been shown, the most obvious basis for an analytical distribution of the various laws which may affect the condition of private persons. Each of these two parts would then again be divisible, in respect to the character of the persons on whom it might operate, into *municipal* (internal) and *international* law. The two branches of *international* law which would thus be made, might each again be divided with reference to the specific character (in respect to *domicil*) of the alien persons to whom it applied, into that law which determines the relations of 'domestic' aliens and that which determines the relations of 'foreign' aliens, as those classes of persons have herein before been distinguished. But—from the mode in which a part of the private international law of any country is *judicially ascertained*, viz., by distinguishing certain principles of the municipal (internal) law as having or as not having universal personal extent or application, and from the fact that those rules which determine the international relations of the States, or their inhabitants, towards each other have also (in being the law of one country or nation) the character of municipal (internal) law—it will be more in accordance with the natural and historical development of the laws of the United States, not first thus to distinguish them, according to their political character or authority, into national and local; but, according to their kind, quality, or effect, and the character of the persons to whom they apply, into *municipal* (internal) and *international* law; and afterwards to subdivide each of these with reference to its various sources and territorial jurisdiction.

"With reference to the foregoing considerations of the operation of the public law of the United States, both in determining the sources of legislation and in having itself effect upon the relations of private persons, the private law of the United States may be classed according to its extent or jurisdiction over territory and persons as either *municipal* (internal) or *international* law.

"The *private municipal* (internal) law may be divided, in respect to its source and extent over territory, into

"1. *National municipal* (internal) law,—contained in the Constitution or proceeding from the general legislative powers of Congress, having national operation and effect throughout the dominion of the United States, whether States or Territories, &c.

"2. *Local municipal* (internal) laws,—proceeding from the powers reserved to the States, or from the legislation of Congress over the Territories, &c., and having operation or effect therein only.

"The *private international* law of the United States may be divided according to the persons upon whom it operates, or in reference to whom it exists—as either:

"1. *International law applied to domestic aliens*—those who, within the jurisdiction of a State, are alien to it, but not to the jurisdiction of the national Government: which part may, in distinction from the other, be denominated the *domestic international* law of the United States.

"2. *International law applied to foreign aliens*—those who are at the same time aliens to the jurisdiction of the national Government, and to that of any State in which they may enter.

"The first of the above named divisions of international law — *domestic international law* — may again be divided in reference to its source and authority into :

" 1. That law which, though *international*, by the character of the persons to whom it applies, is identified in its source and authority with the *national municipal* (internal) law, and which therefore, if acting on private persons, is law in the strict sense, independently of the will of the several States in which it operates; which division, in distinction from the second, may be properly denominated *quasi-international* law. This law is found either:

- " a. In the Constitution itself operating as private law; or,
- " b. In the legislation of Congress under the Constitution.

" 2. That which, though *international* by the character of the persons to whom it applies, is identified in its authority with some local municipal (State) law; and which, if distinguished from the last in its origin, source, or authority, is not law in the strict sense of the word.

" The second of the above principal divisions of the international law, viz., that applying to foreign aliens, may also be subdivided into two parts, according to the jurisdiction of that municipal law in reference to which the person is considered an alien.

" 1. That law which determines the relations of foreign aliens in reference to the national municipal law. This, though *international* from the character of the persons to whom it applies, will be a *law* in the imperfect sense only for the power from which the national municipal law proceeds, and in legal *authority* is identified with that law.

" 2. That law which determines the relations of foreign aliens in reference to the local municipal laws of the several States.

" This again may be distinguished either as,

" a. Law resting on the sources of the national municipal law, and therefore identified in *authority* with the first of these subdivisions.

" b. Law resting on the source of that local municipal law in reference to which the relations of the foreign aliens are considered, and therefore identified with it in its *authority*, as law in the strict sense." §§398—403.

The book may be divided, as the author suggests, into three parts : First, the elementary or abstract portion, contained in the first two chapters ; Second, the historical portion, contained in the nine chapters following ; and Third, the practical portion, contained in the remainder of the book ; of this last portion, six chapters are presented in the volume before us, and the remainder will fill the second volume.

In the first part, the author lays down certain fundamental definitions and principles with great accuracy and exactness. The meanings of "law," "jurisprudence," "international law," "the law of nations," "comity," and various other terms are examined and discriminated with admirable precision. The examination into the sources of the common law, and the true foundation and meaning of what is known as the comity of nations, are especially worthy of attention. If our space permitted we should gladly copy a portion of the author's explanation of the doctrine of comity ; as it is, we content ourselves with the following criticism upon that doctrine as laid down by Story and others : —

" It is evident that if comity or good will, or the prospect of reciprocal advantage is, or ought to be, a motive acting on states and nations — the possessors of sovereign legislative power — and if it does, in an ethical point of view, require states or nations in their political personality to allow foreign laws to operate within their territory, or to recognize

relations created by foreign laws, it is still only a part of *public* international law, from the character of the persons upon whom it operates, and a law in the imperfect sense only, or of an imperfect kind only—a part of positive morality, operating on states. And though it may be admitted that it *ought so to operate* upon any particular state, it still will be the duty of judicial tribunals to ascertain the will of the state upon that point, before allowing or giving effect to the foreign law in any case. It is further evident that when the will of such state on this point has been ascertained, it is entirely immaterial, in jurisprudence, the science of positive law, to inquire what may have been the motive acting on the state or nation, exercising sovereign legislative and juridical power, which induced it to allow or require this international recognition of foreign laws. The tribunal has simply to consider it as the rule of right established by the state. And it would be, for the tribunal and for private persons, equally law and a jural rule if it should have been caused by selfishness or enmity, and be reciprocally disadvantageous." §78.

"The whole of this doctrine of the comity of the nation applied by the court, involves the fallacy that the tribunal is to determine the rule of right for the action of the state, when the whole of jurisprudence is founded on the principle that the state determines the rule of right for the action of the tribunal." §81.

Mr. Hurd enters upon a searching examination of Lord Mansfield's decision in the Somerset case, sustaining the decision, but refuting with great force the reasons given for it by his lordship, or rather the reasons attributed to him in the reports. It is, however, worthy of remark, that the whole argument of Mr. Hurd is directed against the decision as reported by Loftt, who is well known to be an inaccurate reporter. And in the argument of our author in support of the decision upon grounds of his own, the reader will not fail to observe that he is obliged to assume an essential point, viz., that the negro Somerset was a baptized or christian slave, of which there is no evidence excepting the fact of his name being *James Somerset*.

Near the end of the volume occurs an examination of the Dred Scott case, and of an elaborate argument of Senator Benjamin's in support of the dogmas asserted in the opinion of the court as to the local character of slavery, its relation to the national constitution, and the power of Congress over it. Mr. Hurd maintains that slaves are not recognized as *property* in the constitution; that even if they are so recognized, they are not necessarily recognized as property *every where*, (discriminating between the national authority and the national extent of law,) and that property in slaves is not, as contended, precisely upon a level with other property, but that the entire power over slavery, of persons not of European or white race, to establish, modify, or abolish it, excepting where specific provisions occur in the constitution, limiting the power of the legislature, is and always has been in the legislature, unrestrained by common law, or by bills of rights.

We heartily commend this book to the legal profession. The severe limitation of the work to the legal aspect of the subject makes it a book of peculiar value at the present time, when the minds of laymen, and even of judges in the highest positions, appear to be full of confusion upon the subjects considered in it and of a jumbled mass of notions, partly legal, partly political, and partly ethical, from which it is hard to disentangle anything true or sound whatever. We may add that the power of analysis circumspection in the use of language, and logical

consistency displayed in this work, are such as make it an excellent example of juristical reasoning, and worthy to take rank among the best standard works that range among the higher topics of the law.

FIFTH ANNUAL REPORT OF HON. ELISHA H. ALLEN, Chief Justice of the Supreme Court of the Hawaiian Kingdom, to the Legislature of 1858.

The importance and necessity of statistical information for the legislator, whatever may be the subject matter of his action, can hardly be exaggerated. In reference to criminal legislation, its utility is peculiarly apparent. By it the amount and character of criminal delinquency can be determined, and the general and predominating tendencies of the population, the offences to which they are prone, and against the recurrence of which there is need of repressive and punitive enactments on the part of the State, will be ascertained. It is not enough for this purpose, that great offences should be known, but the legislature, to enable it to act wisely, should be advised of all crimes committed, from the highest to the lowest, so far as they may come under the cognizance of the judicial department.

The first report of Chief Justice Allen, made in conformity with a provision of the constitution, requiring him to make known to the legislature the state of the judiciary of the Kingdom, and the business thereto pertaining, embraces the criminal proceedings for three years. It appears that during this period, the whole number of convictions in the Hawaiian Islands, containing less than 150,000 inhabitants, amounted to 12,885. In the list few crimes of the greatest magnitude are found, and these, it is stated, have been committed by foreigners. In this enumeration are included 6,468 cases of drunkenness, and 27 of selling without license — from which it would seem that tippling shops, the cause of drunkenness, are licensed — while drunkenness, their natural and inevitable effect, is punished — and that selling with license affords but a feeble barrier against intoxication. The instances of adultery and fornication number 2,100. There are 1,671 convictions for furious riding and but 6 for letting horses on the Sabbath. The tendencies of these islanders would appear to be in the direction of the *fast* offences — more than three-fourths of all the convictions having their origin in women, wine, and horses, criminal conduct in reference to which constitutes the great staple of their offences. There are 691 instances of assaults and batteries, and 286 of disturbing the peace, which should be placed to the charge of the liquor department, notwithstanding the selling may be licensed.

During the two years preceding the date of the report, \$40,546.66 have been paid into the Treasury from fines and penalties — a much larger amount than has been received from a similar source by most of the States — and indicating the thriving condition even of those who may have become amenable to criminal process.

It would seem desirable that in all the States, provision should be made for full and accurate statistics of all offences in which the government may have intervened for purposes of punishment; of the number of complaints before magistrates, and of the offences for which complaints were made; of the indictments found, and for what crimes; of the convictions and acquittals; of the expenditures of government in this direction, and its reimbursement by way of fine and penalty. In this way the aggregate of crime committed; its direction and tendency; its cost to the State; the efficiency of existing statutes, and the necessity for new provisions will be seen, and the materials acquired for judicious legislation for the future.

AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA. To which is prefixed An Historical Sketch of Slavery. By THOMAS R. R. COBB, of Georgia. Vol. I. Philadelphia: T. & J. W. Johnson & Co. Savannah: H. Thorne Williams. 1858. pp. 358.

All books, pamphlets and speeches on the subject of slavery have a natural tendency to begin at the Creation and work down through Cain, Ham, and Pharaoh to the present time. Mr. Cobb is not exempt from the fate which waits upon his theme. He has an "historical sketch" to show that slavery is as old as sorrow, and as hard to eradicate as sin; that all nations have alternately served and ruled, excepting the blacks, who have done little of the latter. And from all this he draws, of course, the inevitable conclusion that slavery is necessary, right, and desirable, so far as the blacks, or at least the blackest of them, are concerned.

We shall not discuss any of the general questions, moral, social or historical, raised or suggested by the book before us, for the simple reason that they are not legal questions. We are glad to have them discussed with the good temper shown by Mr. Cobb, and advise our readers to examine his early chapters and judge for themselves. They will find some amusement and some profit, we dare say. At all events, it is the right of every one to be heard respectfully when he speaks respectfully, whatever his shade — of opinion.

Turning to the book in its legal aspects, it is written with ability, care and candor, and the discussion of doubtful legal points are marked by learning and discrimination.

It is quite evident, however, that the learned author has and had before he began to write his book, some very decided opinions upon the subjects which he discusses, and his conclusions are quite uniformly favorable to what may be called the Southern view of the subject. Thus he discusses with his usual modesty and learning the question of the effect of the transit of slaves, and concludes that, by the law of nations, a master may carry his slave into a free country, without thereby losing, while in that country, his rights as master, provided he does not acquire a domicil there, and that the doctrine applies with still greater force to the States of this Union. Our author's argument on this head is able and worthy of our readers' careful perusal. It is not supported, however, by sound principle or the weight of authority. We do not intend to discuss the point at present, but refer our readers and refer our author to that part of the very learned and dispassionate work of Mr. J. C. Hurd, (already noticed by us above), in which the learning of the foreign jurists is much more fully brought to bear than by our author, and in which the conclusion is that between foreign nations, (Mr. Hurd has not yet reached the relations of the United States in this respect), no such right now exists. Our reader will also remember some incidental remarks on this topic in our review of the Dred Scott case.

We shall look with interest for the appearance of the second volume of Mr. Cobb's book.

A TREATISE ON THE LAW OF WRECK AND SALVAGE. By WILLIAM MARVIN, Judge of the District Court of the United States for the Southern District of Florida. Boston: Little, Brown & Co. 1858. pp. 375.

Judge Marvin's work, like many other good books, has grown under his hands, as he tells us, from a pamphlet into a volume. It is intended

for merchants, masters of vessels and underwriters, as well as for lawyers, and it will be found useful and instructive by them all.

It contains a brief account of the causes and extent of the wrecking business on the coast of Florida, an excellent chapter on the jurisdiction of the District Court of the United States in admiralty proceedings, and others, on the duties of masters of vessels, and on the principles and practice which govern the rights of all parties to salvage causes.

Our mercantile community will be gratified by the evidence which this book contains, that the important and valuable interests which come for adjudication before the learned author of this work, are disposed of with impartiality, learning and discretion.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF RHODE ISLAND. By SAMUEL AMES, Chief Justice and Reporter. Vol. I. Rhode Island Reports. Vol. IV. Boston : Little, Brown & Co. 1858. pp. 651.

This volume, the fourth only, as the title-page shows, which the Supreme Court of Rhode Island has given to the world, contains the decisions of that court for about two years, ending with the autumn of 1857. The present able and learned chief justice has the advantage, not enjoyed by many of his judicial brethren in other State courts, of reporting the decisions of his own court.

The book is a very creditable one, and leads us to hope that permanent provision has now been made for its successors. Our readers will find many excellent decisions upon points of more than ordinary interest, both in equity and law. Even in the construction of statutes, the judgments of one State have often an important bearing upon the jurisprudence of the others.

We will allude particularly to three cases, in all of which the decisions were pronounced by the chief justice. In *Ditson v. Ditson*, p. 87, the court considers some of the much vexed questions of jurisdiction in cases of divorce, and after commenting on several contradictory and some very absurd judgments in other quarters, lays down as a sound rule, that "By the general law, the jurisdiction of the courts of a country in divorce depends, not upon the place of the marriage and of the breach of its duties; but, marriage being a relation involving the *status* of a party to it, upon the right of the country or nation to determine the *status* of one of its own citizens or subjects, a party to the relation," and that "jurisdiction over the petitioning party alone, as a citizen of a State, is sufficient by the general law, to give jurisdiction to the courts of the State to divorce such party, upon such notice, personal or constructive, to the other party as is possible or customary under the circumstances."

In the matter of *Dorrance street*, p. 230, it is decided that a law concerning the laying out, &c., of streets in Providence, which allows one half of the expense of the improvement to be assessed upon the proprietors benefited thereby, is constitutional and valid.

In *Wilson v. Conway Fire Ins. Co.*, p. 141, a nice distinction is taken, that although, where the agent of an insurance company is employed by an applicant to draw up the application, he thereby becomes for that purpose the agent of the applicant, yet if the agent, by fraud or mistake send an application without authority from the applicant, and insurance is effected thereon, the company will be estopped from setting up mistakes of fact contained in such application.

The volume also contains the rules of court lately adopted for the regulation of practice in the Supreme Court and Court of Common Pleas of Rhode Island.

THE MOST MATERIAL PARTS OF BLACKSTONE'S COMMENTARIES REDUCED TO QUESTIONS AND ANSWERS. By JOHN C. DEVEREUX, Counsellor at Law. Upon the plan and in place of Kinne's Blackstone. New York: Lewis & Blood. 1858. pp. 392.

Mr. Devereux, whose intelligent labors in connection with the decisions of the Court of Claims, we have heretofore been called on to appreciate, has now prepared a much enlarged and improved edition of Kinne's Blackstone. It is a sort of student's catechism, and is intended, by its form, to impress upon the mind of the learner, the general principles of the common law as expounded by its most thorough and elegant commentator. As the great work which forms its foundation is not likely to be outgrown for a long while yet to come, all aids and appliances to its mastery are valuable if well executed. And we think Mr. Devereux's work is accurately and faithfully performed.

No attempt is made, (and in this the author is wise,) to adapt the catechism to anything but the original text of Blackstone. An endeavor to do more would greatly endanger the success of the whole venture, besides swelling the pretensions and bulk of the work indefinitely. The limited scope of the work, however, must necessarily confine its usefulness to beginners of the study of law, or those who cultivate it as amateurs.

A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS, AND THE PRACTICE CONNECTED WITH IT; with a view of the law of Extradition of Fugitives. By ROLLIN C. HURD. Albany: W. C. Little & Co. 1858. pp. 677.

Our readers will not confound this book with that of Mr. J. C. Hurd, on the Law of Freedom and Bondage, which we review in this number. Upon the general subject, its learning and labor are undoubtedly much less than those of that book and of Mr. Cobb's treatise on the law of slavery, but its value as an exposition of the principles and practice in relation to *Habeas Corpus*, with a full discussion of most of the authorities bearing thereon, is learned and valuable. We can especially recommend the chapters on extradition of fugitives from justice. The work fills an important gap in our legal literature, and will be found very useful to the profession.

INTELLIGENCE AND MISCELLANY.

STRANGE SCENE AT QUARTER SESSIONS—BARRISTERS ON STRIKE. A strange scene has occurred at the Michaelmas Quarter Sessions held at Newcastle-on-Tyne. A considerable degree of misunderstanding has existed between the Recorder, Mr. William Digby Seymour, and the members of the Northern Circuit, who have been in the habit of attending the Newcastle Sessions. This misunderstanding has existed for some time, and originated in the circumstance of Mr. Seymour having changed the day on which the sessions had long been held. This day had been extremely convenient to the bar, because by the existing arrangements they attended Durham sessions on the Monday and Tuesday, Newcastle on the Wednesday, and Northumberland on the Thursday. At present they complain of being put to great inconvenience, loss of time, and expense in being brought first to Newcastle, then south to Durham in the following

week, and next, towards the end of that week, north again to Northumberland. At the opening of the second or third sessions before Mr. Seymour, some words on the subject were exchanged between the Recorder and Mr. Hogg as the spokesman on behalf of his brethren of the circuit then in court; and Mr. Seymour then stated that he could not afford to give up his practice as a barrister at Hull sessions in order to accommodate the Newcastle sessions bar by holding his sessions at a time to suit their convenience.

On Monday morning the dissatisfaction of the Bar broke out into an open rupture. The bar met as usual in the Merchants' Chamber adjoining Guildhall; but in accordance, it is said, with a resolution come to by them, at a meeting on the previous evening, dispersed without robing or entering the court. It is usual for the bar to make their appearance immediately after the Recorder has delivered his charge to the grand jury. At Monday's sessions Mr. Lewers, to the surprise of everybody in court, made his appearance alone. When the grand jury had found a true bill the brief for the prosecution was handed, as a matter of course and necessity, to Mr. Lewers. Some time after the case had been opened Mr. John Davison, unrobed, entered the court, and took his accustomed seat at the barrister's table. In a few minutes he was followed by Mr. Fowler, another member, who also took his seat unrobed. After remaining in court a few minutes they left. The immediate consequence of this "strike" of the Bar was that, with the exception of one, the whole of the briefs for the prosecution fell into the hands of Mr. Lewers, who reaped a rather unusual harvest; also that the learned Recorder had himself in one case to conduct the prosecution (Mr. Lewers having originally been retained for the defence;) and that the extraordinary phenomena of attorneys pleading at quarter sessions was witnessed. The learned Recorder having intimated that under the circumstances he would allow attorneys for prisoners to state what might be adduced in their favor, Mr. Lockey Harle and Mr. J. Scaife availed themselves of the permission.—*Law Times.*

CHARLES LOWELL, Esq., late of Ellsworth, Me., a member of the Hancock bar, deceased October 29th, 1858, aged 65 years.

Charles Lowell was the third son of Rosamus Lowell, and was born in Thomaston, Me., Oct. 1st, 1793. He subsequently engaged in trade at Lubec, Me., which he pursued with energy and success, until he had the misfortune to dislocate one of his limbs, and to be otherwise injured by falling from a horse, which dislocation was never reduced. The injuries he had received, and the failure of the surgeons and physicians at Lubec and Eastport to reduce the dislocation, caused his business to be broken up, and by the advice of counsel he commenced a suit against the surgeons and physicians at Lubec and Eastport for mal-practice. At the trial in the C. C. Pleas, he recovered a verdict of \$1900 damages, from which the defendants appealed to the Supreme Judicial Court; and after two severe trials in that court, with eminent counsel on both sides, the action was finally withdrawn, each party paying his own costs. After the action was finally disposed of, he prepared a highly interesting account of the trial, which was published in pamphlet form, and widely circulated.

He subsequently settled in Ellsworth, and was successively editor and proprietor of the *Independent Courier* and the *Northern Statesman*.

After another interval of commercial occupation, he sold out his buildings and stock in trade, and commenced the study of law, in the office of his brother, Hon. J. A. Lowell, of East Machias, and in the office of the late Hon. Thomas Robinson, of Ellsworth; and was admitted to practice in Hancock County in 1849.

He practised his profession with success, both in Illinois and, subsequently, in Ellsworth, until compelled to retire by increasing lameness and failing health.

Mr. Lowell was well known as a writer for Boston and Maine papers, and as a talented and popular lecturer in his own State.

THE ST. LOUIS LAW LIBRARY AND ITS FOUNDER.—Many of our readers know that the Law Library at St. Louis, Missouri, is now the best in the United States; but they may not be aware that a great part of its distinguished success is due to the energy and perseverance of Charles D. Drake, Esquire, the author of the valuable work on "Attachments," which we have lately noticed in this journal. Several prominent members of the bar of St. Louis, mindful of these things, have lately asked Mr. Drake to sit for his portrait, with a view to placing it in the library which owes him so much. But the most remarkable part of the story remains to be told. Mr. Drake, with rare and praiseworthy, though extreme modesty, declines to accede to the request, upon the ground that he has not achieved sufficient distinction to entitle him to so distinguished an honor. The correspondence has been handed to us by a friend, and is highly creditable to all the parties to it. We sincerely hope that the time is not distant when Mr. Drake will, even in his own estimation, be worthy to be painted, and that his example in this important and patriotic work of enlarging and improving the library will be extensively copied in this country. We hope to be able to give, before long, a sketch of the library at St. Louis.

RESIGNATION OF JUDGE THOMAS.—We regret to learn that Mr. Justice Thomas, of the Supreme Judicial Court of Massachusetts, has resigned his seat upon that bench, where he has served with distinguished ability for several years. The cause, too, which is that his salary is insufficient, and very much less than he could earn at the bar, is not very promising for the future of the important tribunal which he leaves. Judicial salaries ought to approximate, in the highest court of each State, to the amount which a first-rate lawyer can earn in that State. We mean they ought to bear a reasonable ratio, say one half, to that amount. The honor and the permanence of the situation ought to supply about a moiety of the compensation, but ought not to be expected to do more.

In a short time, if matters are not amended, the only candidates for judicial preferment will be bachelors and men of fortune, two excellent classes of citizens, but which have no monopoly of talent or learning.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Abbott, Louis D. (1)	Chelsea,	1858.	Returned by
Adams, James R.	Lynn,	Oct. 1,	Isaac Ames.
Allen, Anson F.	Hardwick,	" 28,	Geo. F. Choate.
Amer. Stereotype Comp.	Boston,	" 20,	Henry Chapin.
Ashley, John E. (2)	"	" 18,	Isaac Ames.
Athearn, James F.	"	" 18,	" "
Bassett, Ahaz *	Worcester,	" 1,	Henry Chapin.
Bemis, J. O. (3)	"	" 18,	" "
Birkmaier, John J.	Boston,	" 6,	Isaac Ames.
Blodgett, Peter	Charlestown,	" 21,	Wm. A. Richardson.
Colter, John	Boston,	" 26,	Isaac Ames.
Cossitt, Geo. F. (4)	Chelsea,	" 6,	" "
Croak, Thomas	Boston,	" 16,	" "
Crowell, Erastus	Yarmouth,	" 29,	" "
Cushman, Sabin	Milford,	" 11,	Joseph M. Day.
Dinsmore, James B.	Boston,	" 8,	Henry Chapin.
Dudley, Francis D.	Worcester,	" 14,	Isaac Ames.
Field, John	"	" 7,	Henry Chapin.
Getchell, Jeremiah (5)	Blackstone,	" 5,	Henry Chapin.
Getchell, John G.	"	" 4,	Henry Chapin.
Gilbert, Sylvester P.	Boston,	" 4,	Henry Chapin.
Harris, Henry	Charlestown,	" 1,	Isaac Ames.
Heidenreich, Otho	Marlborough,	" 6,	Wm. A. Richardson.
Herbert, Thomas	Lynn,	" 22,	Wm. A. Richardson.
Howard, John G.	Fitchburg,	" 16,	Geo. F. Choate.
Huff, Owen	Boston,	" 12,	Henry Chapin.
Lovell, Joseph jr.,	Worcester,	" 6,	Isaac Ames.
Morgan, Addison	Boston,	" 13,	Henry Chapin.
Morrison, Joseph W.	Salem,	" 29,	Isaac Ames.
O'Conner, Edward	Boston,	" 6,	Geo. F. Choate.
Parish, Shubael N.	Worthington,	" 11,	Isaac Ames.
Parsons, Charles E.	Malden,	" 18,	Samuel F. Lyman.
Pearson, Geo. W.	Boston,	" 1,	Wm. A. Richardson.
Pollock, Geo. W. (2)	Chelsea,	" 22,	Isaac Ames.
Richards, Francis D. (4)	New Haven, Ct.,	" 18,	Isaac Ames.
Saddler, Wm. W. (3)	Chesterfield,	" 16,	Henry Chapin.
Skiff, Obadiah	Boston,	" 6,	Samuel F. Lyman.
Smith, Thomas	Spencer,	July, 16,	Isaac Ames.
Watson, Asa B.	Tyngham,	Oct. 19,	Isaac Ames.
Williams, Frederick C.		" 30,	Henry Chapin.
		" 13,	D. N. Dewey.

* This case was before the Court for Franklin County.

Firms.

- (1) Gilbert, Abbott, & Co.
- (2) Pollock & Ashley.
- (3) J. O. Bemis & Co.
- (4) Cossitt & Richards.
- (5) John G. Getchell & Son.